Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1998

KAILASH C. PANI, M.D. and KAILASH C. PANI, M.D., P.C.,

Petitioners,

vs.

EMPIRE BLUE CROSS BLUE SHIELD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

ARTHUR R. BLOCK
Attorney for Petitioners
14 Wall Street
28th Floor
New York, NY 10005-2101
(212) 732-0444

149095

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

LOS PK

QUESTIONS PRESENTED

Is a private health insurance company entitled to absolute immunity from tort claims growing out of its administration of Medicare payments to physicians?

Does federal common law confer on health insurance companies administering Medicare claims an immunity which exceeds the statutory liability shields that the companies already enjoy under the Westfall Act amendments to the Federal Tort Claims Act, and under contracts of indemnity authorized by the Medicare Act?

Can the same conduct that does not qualify for sovereign immunity under the "discretionary function" exception of the Federal Tort Claims Act, nevertheless be deemed "discretionary activity" that enjoys official immunity under federal common law?

PARTIES TO THE PROCEEDING

The petitioners, who are plaintiffs and appellants below, are Kailish C. Pani, M.D., who is a natural person, and Kailish C. Pani, M.D., P.C., which is a professional corporation whose sole shareholder is Kailish C. Pani, M.D. The professional corporation does not have a corporate parent, subsidiary, or affiliate that has issued shares to the public.

The respondent, Empire Blue Cross Blue Shield ("Empire"), is the defendant and appellee below.

Before the District Court, the United States of America moved to be substituted as the party defendant or in the alternative to intervene as a party defendant, but its motion was denied as moot and was not appealed. Before the Court of Appeals, the United States of America was granted the status of *amicus curiae*. The petition has been served upon the Solicitor General of the United States.

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Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Decided July 24, 1998 ..... 1a

Appendix B — Opinion And Order Of The United States District Court For The Southern District Of New York Dated December 20, 1996 ..... 19a

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Petitioners, Kailash C. Pani, M.D. and Kailash C. Pani, M.D., P.C., respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67 (2d Cir. 1998)(App. A).[1] The opinion of the United States District Court for the Southern District of New York in *Pani v. Empire Blue Cross Blue Shield*, 93 Civ. 8215 (SHS) (S.D.N.Y. Dec. 20, 1996) is not published, but can be found at 1996 WL 734889 (S.D.N.Y.) (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") was entered on July 24, 1998. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days after entry of the judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 1395u(a) (the "Medicare Act") provides, in relevant part:

> In order to provide for the administration of the benefits under this part . . . the Secretary is authorized to enter into contracts with carriers . . . which will perform some or all of the following

1. References to the Appendices to this petition will be in the form, "App. A at 1a."

> functions . . . ; and, with respect to any of the following functions which involve payments for physicians' services on a reasonable charge basis, the Secretary shall to the extent possible enter into such contracts. . . .

42 C.F.R. § 421.5(b), provides:

> Intermediaries and carriers act on behalf of the Administrator in carrying out certain administrative responsibilities that the law imposes. Accordingly, their agreements and contracts contain clauses providing for indemnification with respect to actions taken on behalf of HCFA and HCFA is the real party of interest in any litigation involving the administration of the program.

28 U.S.C. § 2679 (the Federal Tort Claims Act, as amended by the "Westfall Act") provides, in relevant part:

> (b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim. . . .
>
> (d)(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil

> action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.
>
> (3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. . . .

28 U.S.C. § 2680(a), the Federal Tort Claims Act, provides, in relevant part, that no liability against the United States shall lie for:

> [a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

STATEMENT OF THE CASE

Petitioner Dr. Kailash Pani ("Dr. Pani") is a neurosurgeon. In the 1980s, he treated patients who suffered severe and chronic back pain with a medical procedure known as "Facet Rhizotomy." There were other rhizotomy procedures, but they were surgical and required hospitalization. Dr. Pani was able to achieve comparable results treating patients in his medical office.

In 1981, Dr. Pani sought reimbursement for a few Facet Rhizotomy treatments through the Medicare "Part B" program, which is a voluntary supplemental medical insurance program within Medicare. Under contract to the Department of Health and Human Services ("HHS"), respondent Empire Blue Cross Blue Shield ("Empire") was the Medicare carrier for the county in which Dr. Pani's office was located. A "carrier" is a private insurance company retained by HHS, through the Health Care Finance Administration ("HCFA") to administer claims under Part B. *See* 42 U.S.C. § 1395u(a).[2]

The Medicare program had procedure codes to classify reimbursable medical services and supplies. Dr. Pani sent Empire accurate medical notes describing the procedures he had performed. He left blank the section in the claim form for a procedure code number so that Empire's claims reviewers and medical advisory staff could assign one.

Employees in Empire's Codification Department (who are *not* responsible for investigating possible fraud) filled in Procedure Code Number 5211 ("Code 5211"), and told Dr. Pani

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2. Medicare "Part A" is a mandatory health insurance program covering hospital services. A private insurance company with which HHS contracts to administer claims under Part A is a "fiscal intermediary." *See* 42 U.S.C. § 1395h(a).

to use Code 5211 when he submitted claims for this medical procedure. About two years later, the employees in Empire's Utilization Review Department — without contacting Pani in advance and, apparently, without checking the records of the Codification Department or speaking to their co-employees there — decided that Pani's use of the procedure code was Medicare fraud. In effect, the employees of the two departments created the predicate for a fraud referral.

In 1983, Empire made a fraud referral to the United States Government. Empire did not inform the government that Dr. Pani had never independently sought reimbursement under Code 5211; that Empire's Codification Department had assigned Code 5211 to the procedure; that Empire's Codification Department had advised Dr. Pani to use that code number when he submitted reimbursement forms; or that Empire had never issued a correction to Dr. Pani advising him to discontinue use of the code number.

The Government investigated the entirety of Dr. Pani's medical practice. It indicted him for alleged Medicare fraud in the United States District Court for the Southern District of New York. Almost all of the counts of the indictment were based on his use of Code 5211. Dr. Pani was acquitted on all counts based upon the alleged fraudulent use of Code 5211. He was convicted on counts pertaining to three other claims. *United States v. Pani*, 83 CR. 0735 (S.D.N.Y. May 14, 1984) (Hearing transcript).

Subsequently the United States brought a civil action against Dr. Pani in the United States District Court for the Southern District of New York for money damages based principally upon his use of Code 5211. The court found that Dr. Pani was not liable under any of the causes of action premised upon Dr. Pani's use of the code number. It held that

he was liable solely with respect to the reimbursement items for which he had been criminally convicted. *United States v. Pani*, No. 86 Civ. 4970, slip op. (S.D.N.Y. October 15, 1991).

A. Procedural History

Dr. Pani commenced an action against Empire in New York State Supreme Court by filing a summons with notice dated October 15, 1993. His complaint set forth three claims: negligence and fraud; tortious interference with contractual relations; and breach of contract. Empire removed the action to the District Court by filing a notice of removal dated November 30, 1993. (JA-7)[3]. Dr. Pani filed the instant complaint on January 19, 1994. (JA-12). Empire filed its answer on May 9, 1994. (JA-18).

On April 18, 1995, Empire filed a notice of motion for leave to file an amended answer and to dismiss the complaint. Empire's proposed amended answer added an affirmative defense that alleged, in full, "Plaintiff's alleged causes of action are barred by the doctrine of official immunity." (JA-44).

The United States, on April 18, 1995, filed a motion to be substituted as the proper party defendant or to intervene. (JA-46). It also moved pursuant to Rules 12(b)(1) and 12(b)(6) to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. In the alternative, it sought summary judgment, and pursuant to Local Rule 3(g) filed a statement of material facts allegedly not in dispute. The statement consisted of three paragraphs, none of them pertaining to the official immunity defense. (JA-187).

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3. References to the Joint Appendix filed with the Court of Appeals are in the form, "JA-1."

On December 20, 1996, the District Court issued a memorandum opinion (App. B at 19a), in which it held that the complaint should be dismissed. Judgment was entered on December 26, 1996. (JA-198). Dr. Pani timely filed his notice of appeal on January 15, 1997. (JA-199). No cross appeal was filed either by the defendant, Empire, or by the putative intervenor, the United States.[4]

The Court of Appeals had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. The subject matter jurisdiction of the District Court was conferred by 28 U.S.C. § 1442(a)(1).

B. The Decisions Below

The District Court granted Empire's motion to amend its answer to add the affirmative defense of official immunity. It deemed the balance of Empire's motion to be a motion to dismiss pursuant to Fed. R. Civ. Pro. 12(b)(1) and (6). It granted Empire's motion under Rule 12(b)(6) to dismiss Dr. Pani's first and second claims; dismissed the third claim (breach of contract) under Rule 12(b)(1); and denied the government's motion as moot. Official immunity was the sole grounds for dismissing the first claim and an alternative grounds for dismissing the other two.

Dr. Pani filed an opening brief in the Court of Appeals which argued, *inter alia*, that Empire could not invoke official immunity because it was a private corporation engaging in health insurance administration in both the private and public sectors (and not a "federal official"), and because the complained of conduct by the Empire employees was not

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4. Notwithstanding the government's contractual agreement to defend and indemnify carriers, the Attorney General did not enter an appearance before the Court of Appeals as counsel for Empire.

"discretionary" as that term has been applied in official immunity cases and under the Federal Tort Claims Act.

Empire then made a motion to stay the appeal pending the decision of this Court in *Richardson v. McKnight*, 521 U.S. 399, 117 S. Ct. 2100, 138 L. Ed. 2d 540 (1997). The stay was lifted after this Court issued its decision in *Richardson v. McKnight*, holding that employees of a private correctional services company could not assert the defense of qualified immunity in response to civil rights actions.

The subsequent Court of Appeals' decision in the instant case distinguished *Richardson v. McKnight*, and affirmed. It held "that a fiscal intermediary or carrier is immune from suit for torts that arise out of the performance of its duty to investigate and report possible Medicare fraud." (App. A at 2a). By implication, it determined that every act of an employee of a carrier that can be connected to the function of investigating fraud is "discretionary activity" within the meaning of official immunity doctrine. It did not attempt to distinguish this case from decisions of this Court applying the concept of "discretionary conduct" under the FTCA. *See, e.g., Berkovitz v. United States*, 486 U.S. 531, 108 S. Ct. 1945, 100 L. Ed. 2d 531 (1988). In addition, the Court of Appeals rejected Dr. Pani's argument that the record before the District Court on the Rule 12(b)(6) motion to dismiss was an inadequate basis for sustaining the affirmative defense of immunity.

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS DECISION CONFLICTS WITH THIS COURT'S RULING IN *RICHARDSON v. McKNIGHT.*

In *Richardson v. McKnight*, 521 U.S. 399, 117 S. Ct. 2100, 138 L. Ed. 2d 540 (1997) ("*Richardson*"), this Court held that prison guards employed by a private firm are not entitled to a qualified immunity from suit by prisoners charging a violation of 42 U.S.C. § 1983. The decision established a methodology for determining when a private actor may assume the status of a government official for the purpose of immunizing itself from lawsuits. Although the case did not involve the doctrine of official immunity, the Court's analysis clearly is applicable to the threshold inquiry as to whether a private party invoking the immunity may be deemed a "federal official." It is also applicable to the ultimate balancing test in which the (possible) value of shielding governmental surrogates from lawsuits alleging misconduct in their running of privatized government programs, is weighed against the rights of individuals to pursue their tort claims and obtain redress for meritorious ones.

The decision below apparently is the first Court of Appeals ruling that considers *Richardson* in deciding whether or not a private health insurance corporation working as a Medicare carrier can invoke official immunity.[5] The Court of Appeals'

5. The United States Court of Appeals for the Eighth Circuit upheld a common law claim of official immunity by a Medicare intermediary in a post-*Richardson* decision, but the there is no indication that it considered the implications of *Richardson*, which is not mentioned anywhere in the decision. *See Midland Psychiatric Associates, Inc. v. United States*, 145 F.3d 1000 (8th Cir. 1998). The Eighth Circuit's ruling was issued about two months prior to the Second Circuit decision, but it is not cited therein. The Second Circuit does cite the district court decision.

decision conflicts with *Richardson* because it does not even attempt to apply *Richardson*'s mode of historical analysis. Further, while the Court of Appeals does discuss purposes and policy, its methodology and criteria are inconsistent with the "purposes" analysis used by this Court. Finally, the Court of Appeals' grounds for distinguishing *Richardson* are unsound.

A. History

An otherwise closely divided Court in *Richardson* was unanimous in concluding that the determination of the non-governmental actor's immunity defense must begin with an historical analysis. Can the private actor trace itself back to a " 'firmly rooted' tradition of immunity"? *Id.*, 117 S. Ct. at 2104. The civil rights act in question was silent on the issue of immunity. Therefore, it had to be decided whether there was such a strong tradition of immunity for private jailers, that if Congress wanted to extinguish the immunity it would have had to have done so explicitly. If yes, then the immunity would be perpetuated in federal common law; if no, then the private jailers lacked immunity. The majority and dissenting opinions reviewed centuries of American and English precedents to answer this historical question.

In the instant case, the decision of the Court of Appeals is strikingly unhistorical. In its brief discussion of *Richardson*, it states that "[Medicare] fiscal intermediaries and carriers . . . are carrying out a traditional government function." (App. A at 12a-13a). Given that the Medicare program is fewer than 35 years old, it is far from clear how the court concluded that providing health insurance programs is a traditional government function. Health insurance is traditionally purchased from private companies. Indeed, the reason for hiring private insurance companies like Empire to administer Medicare claims is that the private sector has many more decades of experience than the federal government in the health insurance field.

The Medicare statutes are detailed and comprehensive. Yet, Congress has enacted no provision that expands official immunity to extend its protection to private companies acting as Medicare carriers and intermediaries. Hence, the extension of official immunity to these private actors under federal common law only can be recognized if there is a "firmly rooted tradition" of immunity for private insurance companies administering government health insurance programs. The Court of Appeals did not even inquire. If it had, the answer would have to be that there is not.

There is far less evidence of a tradition of immunity for Medicare intermediaries than there is for private jailers. All prisons and jails in the United States are owned and controlled by governments. By comparison, health insurance was historically offered solely by private companies; now it is an example of "government and private industry [engaging] in fundamentally similar activities." *Richardson*, 111 S. Ct. at 2106. Private health insurance companies have no immunity from tort suits when they handle the accounts and claims of their millions of subscribers. They have no immunity from tort suits arising out of their administration of private "Medigap" insurance policies — coverages which dovetail with the government Medicare health insurance program. Yet the consequence of the Court of Appeals decision is that if a company commits the same kind of alleged tort two times, one in a matter involving the Medicare program the other in a matter involving its private health insurance business, the company will be immune from the first suit and but will have to defend the second one. Certainly this result is not necessary to continue any firmly rooted tradition of immunity applicable to privately employed government health program administrators.

If Congress deems it necessary for private health insurance companies acting as Medicare carriers to have greater protection

from damage suits than they already enjoy[6] (with a corresponding extinguishing of the rights of injured citizens), then it may so legislate. Under the historical analysis required by *Richardson*, however, there is no basis for the federal courts to broaden federal common law immunities.

B. Purposes

Richardson stated that a determination whether a private person can invoke a federal common law immunity of government officials requires an examination of the immunity doctrine's purposes.[7]

It held that the purposes of qualified immunity for government officials who are sued under the civil rights act did not warrant immunity for private prison guards.

The purposes of qualified immunity for civil rights defendants are the same as the purposes for official immunity — to protect the public from unwarranted timidity on the part of public officials, and to "ensure that talented candidates were not deterred by threat of damages suits from entering public service." *Wyatt v. Cole*, 504 U.S. 158, 167 (1992) (quoted in *Richardson*, 117 S. Ct. at 2107) (qualified immunity); *See also Westfall v. Erwin*, 484 U.S. 292, 295 (1988) (official immunity). *Richardson* applied these criteria to a private party performing activities for the government.

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6. *See* Point III, *infra*. Under the Federal Tort Claims Act, as amended by the Westfall Act, a carrier that is sued in tort may seek to have the United States substituted in its place as the party defendant. In addition, pursuant to the Medicare Act, HCFA contractually agrees to have the United States conduct the legal defense for carriers that are sued and to indemnify them for liabilities.

7. Justice Scalia's dissenting opinion for four members of the Court would have held that the historical analysis is conclusive, and no "purposes" analysis is necessary.

The Court recognized the important role that tort liability law plays in forcing private companies to respect the rights of individuals. In the government sector, the accountability of employees has to operate within civil service rules and other restrictions. It is presumed that some of the incentive for competent performance is commitment to public service. Private companies generally have much more leeway to use economic incentives and penalties to maintain standards of employee conduct. Hence, the economic effects of tort liability can be translated more easily into corrective organizational action.

Richardson left open the question whether immunity might have been extended to a prison management company that was organized in a nonprofit mode. The court below alludes to this potential distinction, noting that the *Richardson* defendants "were employees of a private for-profit company," and that "fiscal intermediaries and carriers operate under not-for-profit *contracts* with the federal government." (Emphasis supplied) (App. A at 12a-13a). Presumably, the lower court refers to not-for-profit "contracts" rather than not-for-profit "corporations," because HCFA is authorized to retain private profit-making insurance companies as carriers. This is exemplified by the fact that Empire is currently organized as a not-for-profit corporation, but it has applied to the Attorney General of the State of New York for consent to a reorganization that would involve the transfer of substantially all of its assets and health insurance operations — including an assignment of its Medicare carrier/intermediary contracts with HCFA — to a business corporation that is intended to make a public offering of stock shares.[8]

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8. Empire posted to its Internet web site its draft of a petition to the Supreme Court of the State of New York, New York County, for approval of the plan, together with an explanatory note that Empire was

(Cont'd)

The Court of Appeals did not limit its holding to not-for-profit corporations. For-profit insurance companies that serve as Medicare carriers also would be immune from tort suits. (Nor did it explain how its passing reference to so-called "not-for-profit" contracts could be the basis for immunity.) This Court's *dictum* in *Richardson* regarding profit or nonprofit status does not support the Court of Appeals' expansion of federal common law immunity.

It is respectfully submitted that one of the reasons for the Court to grant the petition is to clarify the point it left open in *Richardson* regarding profit/nonprofit organization. Just because there is no private inurement of profits through shareholder dividends and appreciated stock prices does not mean that there are no financial incentives and market forces operating on a private nonprofit company. For example, the level of compensation for the employees of a nonprofit company is related to the economic efficiency of the company. The compensation packages for managers and top executives often are tied to the organization's financial performance. (By contrast, the Secretary of Health and Human Services does not get a bonus if Medicare costs are decreased.) Even if it is assumed that contract payments to carriers are based in part on reimbursement of "cost," without a designated "profit," the benefits to an organization of having tens of millions of dollars of its expenses reimbursed, including facilities costs, administrative overhead, and employee compensation and benefits, are not to be gainsaid.

Continued exposure to tort liability has the beneficial effect of giving nonprofit organizations an incentive to demand higher

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(Cont'd)
seeking consent from the Attorney General. *See* "Petition narrative," (visited February 10, 1998) <http://www.empiremedicare.com/eempirehealthcare/petitionnarrative.html>.

standards of performance from their employees, in order to protect the organization's "bottom line." Given the tremendous impact of Medicare and other health insurance on the lives of Americans, incentives for improved administration of health care claims are very much in the public interest. This is hardly a time for federal courts to strip providers (and, by extension, health care consumers) of their existing rights under state tort law.[9]

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9. The Court of Appeals tries to distinguish *Richardson* by stating that "fiscal intermediaries and carriers are acting as adjuncts to the government and are carrying out a traditional government function." (JA-13a). This is an apparent reference to this Court's caveat:

> The case does not involve a private individual *briefly associated with a government body*, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision.

(Emphasis supplied). *Richardson*, 117 S. Ct. at 2108. However, the Court of Appeals' gloss is contrary to both the syntax and contextual meaning of this Court's statement. The phrase, "briefly associated with a government body," modifies the two clauses that follow it. This is a reference to situations involving very limited engagement (e.g. a consultant hired for a particular task), as distinguished from what this Court describes elsewhere in *Richardson* as "a private firm, systematically organized to assume a major administrative task . . . with limited direct supervision by the government. . . ." *Id.* The latter description is the one that applies to Medicare carriers like Empire.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE EXTENSION OF FEDERAL COMMON LAW OFFICIAL IMMUNITY TO FURTHER SHIELD MEDICARE CARRIERS FROM TORT LIABILITY IS CONTRARY TO THE WESTFALL ACT AND THE MEDICARE ACT.

Two acts of Congress protect Medicare carriers from having to bear the cost of defending tort suits or of paying damage judgments. At the inception of the Medicare program in 1965, Congress anticipated that the federal government would "safeguard the interests of [its] contractual representatives." Senate Report No. 404, Social Security Amendments of 1965, *reprinted in* 1965 U.S.C.C.A.N. 1943, 1995. For over thirty years, this has been accomplished, largely, through contractual indemnification. The pertinent regulation, 42 C.F.R. § 421.5(b), provides:

> Intermediaries and carriers act on behalf of the Administrator in carrying out certain administrative responsibilities that the law imposes. Accordingly, their agreements and contracts contain clauses providing for indemnification with respect to actions taken on behalf of HCFA and HCFA is the real party of interest in any litigation involving the administration of the program.

In 1988, Congress greatly increased the protection from suit accorded to federal officials.[10] The Westfall Act,[11]

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10. Congress passed the Westfall Act in 1988 in response to this Court's decision in *Westfall v. Erwin*, 484 U.S. 292, 108 S. Ct. 580, 98 L. Ed. 2d 619 (1988).

11. Nov. 18, 1988, Pub. L. 100-694, §§ 5, 6, 102 Stat. 4564.

28 U.S.C. § 2679, amended the Federal Tort Claims Act to provide that when a federal official is sued in tort arising out of acts committed in the scope of his employment, he is entitled to have the United States substituted as the party defendant.[12] In other words, an action against the United States became the only remedy for injuries caused by federal employees acting within the scope of their employment, regardless of whether the conduct in question was discretionary. The substitution absolutely shields the official from litigation defense costs and from potential liability.[13]

Hence, since 1988, Medicare carriers[14] have been protected from tort suits through the substitution of the United States as defendant. Although HCFA might have determined that the Westfall Act rendered the agency's decades old practice of granting indemnity contracts redundant and unnecessary, apparently it has continued to give the carriers contractual indemnification.

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12. Procedurally, the substitution will take place upon certification by the Attorney General that the employee was acting within the scope of his employment when the allegedly harmful conduct occurred. If the Attorney General denies certification, the employee may seek to have a United States District Court reverse that decision. *See* 28 U.S.C. § 2679 and 28 U.S.C. § 1346(b).

13. The substitution by the United States may or may not trigger the dismissal of the plaintiff's claim altogether. This depends on whether it is a type of claim that can be maintained against the United States under a waiver of sovereign immunity.

14. If the Court agrees with the petitioners that Medicare carriers are not "federal officials" (*see* Point I, *supra*), then they must be denied official immunity on that ground alone. Assuming *arguendo* that the carriers are federal officials, then the arguments in Point II are an independent ground for rejecting their federal common law immunity claim.

Consequently, private health insurance companies that perform carrier functions enjoy significantly greater legal protections against tort suits than regular federal officials. There is no reason to suppose that unless the carriers are given an extraordinary *third* layer of protection — the shield of official immunity — then the carriers will be intimidated by the threat of tort suits from exercising their discretionary decision-making functions independently and aggressively.

The Court of Appeals incorrectly stated that the Westfall Act was not relevant to Medicare carriers and their assertion of official immunity —

> The application of the Westfall [*Westfall v. Erwin*] test to federal officials was superceded by Congress's passage in 1988 of the . . . Westfall Act, which eliminated the requirement that the acts be discretionary. . . . However, the Westfall test remains the framework for determining when *nongovernmental persons* or entities are entitled to the *same immunity*. [citations omitted]

(Emphasis supplied) (App. A at 9a). If a "nongovernmental person" is to be deemed a federal official for the purposes of official immunity (as the Court of Appeals did in this case), by the same token the nongovernmental person would be treated as a federal official under the Westfall Act. Furthermore, official immunity is not the "same immunity" as the protection provided by the Westfall Act. The granting of official immunity is the death knell of the plaintiff's tort claim. Westfall certification, on the other hand, substitutes the United States as the defendant and then the plaintiff's claim proceeds under the FTCA. At that point, one of the defenses to the claim that might be asserted is that the challenged conduct falls within an exception to the FTCA's waiver of sovereign immunity because

the conduct part and parcel of a "discretionary function." *See* Point III, *infra*. Unless the United States sustains that defense, the plaintiff's claim remains viable.

Fear of tort litigation is not about to impair Medicare carriers from effectively carrying out their responsibilities regarding investigation of possible Medicare fraud. They are already completely protected from defending suits and paying judgments so long as they are acting within the scope of their employment (Westfall Act certification). If, for some reason, the United States is not substituted under the Westfall Act procedures, the United States is contractually obligated to have the United States Attorney defend the suit and to be indemnified for any damage awards, *unless* the carrier acted outside the scope of its authority, or if the carrier's conduct is found by a court or tribunal "to be criminal in nature, fraudulent, or grossly negligent.[15] The net result of the Court of Appeals' expansion of official immunity is to protect these private companies from being responsible for misconduct from which the United States must disassociate itself.

Of course, the Court of Appeals decision has another effect. If official immunity doctrine is available to be invoked by a carrier as a *first* line of defense, then the plaintiff will be barred not only from suing the carrier, but also from proceeding with a FTCA claim against the United States as substituted defendant. This will save the government money in defense costs and damage judgments with respect to suits under the FTCA. This effect is not mentioned in the lower court's decision, nor was it advanced by the United States in its *amicus* brief.[16] For good reason. Administrative convenience and

15. *See* Contract, Article XIV, section A (JA-122).

16. Nor did the United States explain why the Attorney General (Cont'd)

monetary savings are not interests that can justify extinguishing the rights of allegedly injured parties to prosecute tort claims against carriers (or against the United States as the substituted defendant).

It is respectfully submitted that this Court should grant the petition because the decision of the Court of Appeals is contrary to the statutory schemes of liability protection of the Westfall Act and the Medicare Act.

(Cont'd)
did not make a Westfall Act certification in this case and why the United States Attorney did not take over the defense of this action under the provisions of the indemnity contract. (The belated motion by the United States in the District Court to be substituted as the party defendant was not grounded upon a Westfall certification.) Rather than following the Westfall Act procedures and honoring its contractual obligation to provide a legal defense, the United States tried to extinguish petitioner's claim at the outset, if at all possible, but to keep its options open to disclaim indemnification liability if the suit proceeds and the petitioner wins a damage judgment. This is similar to the government's strategy in a situation involving two parallel suits that pre-dated the Westfall Act — one against a Medicare intermediary and the other against the United States under the FTCA. At that time, the Court of Appeals noted :

> The government urges us to find that these intermediaries acted as government agents and are therefore entitled to absolute official immunity . . . Yet, in the FTCA suit, the government claims, interestingly enough, that the intermediaries are not its agents.

Group Health Incorporated v. Blue Cross Association, 793 F.2d 491, 492 (2d Cir. 1986).

III. THE PETITION SHOULD BE GRANTED TO ASSURE UNIFORMITY IN DETERMINING WHAT CONDUCT BY FEDERAL OFFICIALS IS IMMUNE FROM SUIT BECAUSE IT IS "DISCRETIONARY."

Although a decade has passed since this Court's decision in *Westfall v. Erwin* and Congress's enactment of the Westfall Act, the Court of Appeals' decision (and the lower court precedents on which it relies) do not fully recognize the link that these legal developments forged between the official immunity doctrine and the Federal Tort Claims Act. The instant case is an important example. A tort claim against a Medicare carrier might proceed either as an original action against the United States under the FTCA (*respondeat superior* liability); as an original action against the carrier that is transformed into an FTCA case against the United States by a Westfall Act certification (*see* Point II, *supra*); or as a tort action against the carrier in which the official immunity defense is raised. In each posture, whether the plaintiff's claim will be heard on the merits may hinge on whether the conduct giving rise to the alleged claim is "discretionary."

The FTCA contains exceptions to its broad waiver of sovereign immunity. One of these provides that no liability shall lie for

> [a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a *discretionary function* or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(Emphasis supplied) 28 U.S.C. § 2680(a). Similarly, in *Westfall v. Erwin*, this Court held that a federal official acting within the scope of his duties is absolutely immune from suit if the complained of conduct was "discretionary activity."

Of course, the application of "discretionary function" in the FTCA is a matter of statutory construction, whereas the meaning of "discretionary" in official immunity analysis is a product of federal common law. However, at least as early as its decision in *Berkovitz v. United States*, 486 U.S. 531, 537, 108 S. Ct. 1945, 100 L. Ed. 2d 531, 541 (1988) ("*Berkovitz*"), this Court noted a connection between these inquiries. Now that the Westfall Act certification process allows the direct transformation of a case in which official immunity would be asserted into an FTCA case against the government, there will be anomalous results unless the "discretionary" standard is applied uniformly.

The Court of Appeals did not address Pani's argument that this Court's FTCA precedents must be considered in applying the official immunity doctrine, and that under those precedents Empire's conduct could *not* be found to be discretionary. Instead, citing lower court official immunity rulings involving Medicare carriers and intermediaries (all of which pre-date *Richardson v. McKnight* and some of which predate *Westfall v. Erwin* and the Westfall Act), the Court of Appeals broadly held that a carrier "is immune from suits for torts that arise out of the performance of its duty to investigate and report possible Medicare fraud." (App. A at 2a). "The investigation and reporting of possible Medicare fraud," it said, "is precisely the type of delegated discretionary function that the public interest requires to be protected by immunity." (App. A at 10a). Neither of these formulations explains the premise that *every* act performed by *every* employee of a carrier that relates to investigating and reporting Medicare fraud is "discretionary."

While petitioner contends that this holding is contrary to *Westfall v. Erwin*, both procedurally[17] and substantively, a

17. In *Westfall v. Erwin*, this Court found that the District Court's (Cont'd)

policy issue of a higher order is presented by the Court of Appeals' refusal to even consider this Court's precedents under the FTCA, and the inconsistency between its holding and these very precedents. This conflict can be illustrated by the leading FTCA case of *Berkovitz v. United States*, 486 U.S. 531, 108 S. Ct. 1945, 100 L. Ed. 2d 531(1988)("*Berkovitz*").

The plaintiff in *Berkovitz* was a minor who had contracted a severe case of polio after ingesting a dose of an oral polio vaccine. His parents sought to hold the United States liable based upon the actions of one federal agency, which licensed the production of the vaccine, and of another federal agency, which approved the release to the public of the particular lot of vaccine containing Berkovitz's dose. The Third Circuit had dismissed the action on the ground that the licensing and release of the polio vaccines are wholly discretionary actions protected by the exception.

This Court unanimously reversed. It rejected the government's broad formulation of the "discretionary function"

(Cont'd)
granting of summary judgment based upon the affirmative defense of official immunity was error because the defendant had "not presented any evidence relating to [its employees'] official duties or to the level of discretion [the employees] exercise." *Id.* at 299. In the instant case, in which the affirmative defense was granted on a Rule 12(b)(6) motion, the record was completely inadequate to show that the conduct of the various Empire employees who were responsible for assigning a procedure code to Pani and for making a fraud referral to the government involved a high level of discretion. While this Court has encouraged the presentation of immunity defenses through summary judgment motions, the consideration (and granting) of the Rule 12(b)(6) motion in this case was premature and incorrect. Petitioner respectfully submits that if his petition for *certiorari* is granted, that this important procedural issue should be subsumed under the broader formulations of the Questions Presented, *supra*.

exception. 486 U.S. at 538. Then, it took up the plaintiff's claims one by one, and found in each instance either that the complained of actions by the federal agencies were not discretionary functions, or that a factual record would have to be developed before a determination could be made on that question. For example, it noted that when an agency makes an incorrect compliance determination, that decision only falls within the exception if the agency was authorized to exercise a policy choice in the making of the compliance determination. 486 U.S. at 547. The "discretionary function exception," it said, "applies only to conduct that involves the permissible exercise of policy judgment." 486 U.S. at 540. *See also Indian Towing Co. v. United States*, 350 U.S. 61 (1955)(Government's failure to maintain a lighthouse in good condition did not involve any permissible exercise of policy judgment); *Andrulonis v. United States*, 924 F.2d 1210, 1220 (2d Cir. 1991) (Government scientist's failure to warn worker of dangers "was a nondiscretionary negligent omission that did not implicate any balancing of policy factors.")

If the federal officials who were responsible for licensing the production of the polio vaccine, and the ones who were responsible for approving release to the public of the particular lot of vaccine containing Berkovitz's dose, were not operating at a high enough level of discretion to trigger the shield of sovereign immunity, then surely the actions of Empire's employees fell far short of that threshold. As a general matter, this result follows from this Court's observation in *Heckler v. Community Health Services*, 467 U.S. 51, 64-65, 81 L. Ed. 2d 42, 55, 104 S. Ct. 2218 (1984) that a Medicare fiscal intermediary "only acted as a conduit; it could not resolve policy questions." Looking at the particulars of the instant case only strengthens the conclusion that the allegedly tortious conduct "did not implicate any balancing of policy factors." *Andrulonis v. United States*, *supra*, 924 F.2d at 1220.

Empire's employees did not uncover and report on pre-existing facts that suggested fraud. Working in tandem, the employees in the Codification Department (who assigned Code 5211) and the employees in the Utilization Review Department (who decided that Pani's use of Code 5211 was fraud) — created the predicate for the fraud referral. Nor was Empire acting within a protected zone of "discretion" when it created and perpetrated a structure in which two of its departments were working in conflict with each other and thereby causing harm to providers or patients.

The petition should be granted so the this Court can assure that a single standard of "discretionary" activity governs determinations of whether conduct attributable to "federal officials" or to the United States is immune from suit.

CONCLUSION

Petitioners respectfully request that their petition for a writ of certiorari be granted to review this important matter. Following that review, this Court should reverse the Second Circuit and order that respondent Empire's motion to dismiss the first and second causes of action in the complaint should be denied.

Respectfully submitted,

ARTHUR R. BLOCK
Attorney for Petitioners
14 Wall Street
28th Floor
New York, NY 10005-2101
(212) 732-0444

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED JULY 24, 1998

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 1997

(Argued January 5, 1998 Decided July 24, 1998)

Docket No. 97-7086

KAILASH C. PANI, M.D., and
KAILASH C. PANI, M.D., P.C.,

Plaintiffs-Appellants,

—v.—

EMPIRE BLUE CROSS BLUE SHIELD,

Defendant-Appellee.

Before:

VAN GRAAFEILAND and WALKER, *Circuit Judges*, and KOELTL, *District Judge*.*

Plaintiffs-appellants Kailash C. Pani, M.D., and Kailash C. Pani, M.D., P.C., appeal from the December 26, 1996, judgment of the United States District Court for the Southern District of New York (Stein, *J.*) granting defendant Empire Blue

* The Honorable John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

Appendix A

Cross Blue Shield's motion to dismiss under Fed. R. Civ. P. 12(b)(1) and (6).

AFFIRMED.

ARTHUR R. BLOCK, New York, New York, *for Plaintiffs-Appellants.*

JEFFREY D. CHANSLER, Esq., New York, New York (Kathleen L. Ames, Esq., Office of Jeffrey D. Chansler, New York, New York, *Of Counsel*), *for Defendant-Appellee.*

GIDEON A. SCHOR, Assistant United States Attorney (Mary Jo White, United States Attorney for the Southern District of New York, Steven M. Haber, Assistant United States Attorney, *Of Counsel*), *for Amicus Curiae United States of America.*

WALKER, *Circuit Judge*:

This appeal raises the issue of whether a private insurance company is entitled to official immunity when acting as a fiscal intermediary or a carrier on behalf of the United States in the administration of a Medicare program. We hold that a fiscal intermediary or carrier is immune from suit for torts that arise out of the performance of its duty to investigate and report possible Medicare fraud.

BACKGROUND

Plaintiff-appellant Kailash C. Pani, M.D., a neurosurgeon and sole principal in plaintiff-appellant Kailash C. Pani,

M.D., P.C. (collectively "Pani"), maintained a medical practice in Tarrytown, New York. Defendant-appellee Empire Blue Cross Blue Shield ("Empire") was the Medicare carrier for Westchester County under contract to the Department of Health and Human Services ("HHS"). Under the Medicare Act, 42 U.S.C. § 1395 *et seq.*, a "carrier" is a private insurance company that contracts with HHS to administer claims submitted under the Medicare "Part B" program, a voluntary supplemental medical insurance program, while a "fiscal intermediary" is a private insurance company that contracts with HHS to administer major medical claims under the Medicare "Part A" program. *See* 42 U.S.C. §§ 1395h(a), 1395u(a). As a carrier, Empire was responsible for processing Medicare claims submitted by health-care providers, including assigning authorization codes, making payments, and reviewing claims for possible fraud. *Id.*

Between September 1981 and February 1983, Pani submitted Medicare claims to Empire for a procedure Pani called a "facet rhizotomy." At first Pani submitted claims that did not contain a procedure code. After Empire's claims department assigned the code "5211," a code for rhizotomy, to these claims based on the procedure described by Pani, Pani submitted several more claims using that code number.

Sometime in 1983, Empire reported to HHS that it suspected Pani had submitted claims for procedures he had not performed or for procedures that were not "facet rhizotomies." Following an investigation by the United States Attorney's Office, Pani was indicted on nine counts of mail fraud, in violation of 18 U.S.C. §§ 1341-42; 63 counts of filing false claims against the government, in violation of 18 U.S.C. § 287; and 50 counts of conversion of government funds, in violation of 18 U.S.C. § 641. *See United States v. Pani*, 717 F. Supp. 1013, 1014 (S.D.N.Y. 1989). Pani was ultimately convicted, following a bench trial, on four counts

of mail fraud, three counts of making false claims, and three counts of conversion. *See id.* The district judge acquitted Pani on the remaining counts finding that Empire "certainly had an obligation to find out more about what they were approving, and they were . . . on warning that these were not rhizotomies, surgical rhizotomies, performed in a hospital." *United States v. Pani*, 83 CR. 0735, Hearing tr. at 10-11 (S.D.N.Y. May 14, 1984). In subsequent proceedings, Pani was found liable to the federal government for civil damages under the False Claims Act, 31 U.S.C. §§ 3729-31, and convicted in a state prosecution for Medicaid fraud. *See United States v. Pani*, No. 86 Civ. 4970, slip op. at 5-6 (S.D.N.Y. Oct. 15, 1991); *United States v. Pani*, 717 F. Supp. 1013, 1019 (S.D.N.Y. 1989); *People v. Pani*, 138 A.D.2d 532 (N.Y. App. Div. 1988).

In October of 1993, Pani filed suit in New York state court against Empire. Pani's complaint sought $10 million based on claims for (1) negligence; (2) tortious interference with contractual relations; and (3) breach of contract arising out of Empire's report to the United States government of possible fraud by Pani. Empire removed the action to federal district court pursuant to 28 U.S.C. §§ 1441(b) and 1442(a)(1), which permits removal by "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office."

Empire's initial answer asserted that Pani had failed to state a claim and that Pani's claims were barred by the statute of limitations. On April 18, 1995, the United States moved to be substituted as the proper party defendant, or, alternatively, to be allowed to intervene pursuant to Fed. R. Civ. P. 24. The United States also moved to dismiss Pani's complaint under Fed. R. Civ. P. 12(b)(1) and (6) for lack of subject matter

jurisdiction, for failure to state a claim, and because Pani's claims were barred by the statute of limitations, or, in the alternative, for summary judgment. On the same day, Empire sought leave to file an amended answer in order to assert official immunity as an additional defense and moved to dismiss the complaint for the reasons submitted in the government's brief.

The United States District Court for the Southern District of New York (Sidney H. Stein, *Judge*) granted Empire's motion to dismiss and denied the government's motion as moot. *Pani v. Empire Blue Cross Blue Shield*, No. 93 Civ. 8215, 1996 WL 734889 (S.D.N.Y. Dec. 23, 1996). Pani's breach of contract claim was dismissed for lack of subject matter jurisdiction, pursuant to Fed R. Civ. P. 12(b)(1) and 42 U.S.C. § 1395u(b)(3)(c). *Id.* at *3. The claim for tortious interference with contractual relations was dismissed because Pani had failed to establish the *prima facie* elements of the tort. *Id.* at *2. Finally, the district court dismissed Pani's claim for negligence on the ground of official immunity, and added that immunity provided an alternative basis for dismissing Pani's other claims. *Id.* at *3-*5.

On appeal Pani challenges the dismissal of his negligence and tortious interference claims, but not the dismissal of his breach of contract claim. Pani contends, *inter alia*, that Empire is not entitled to official immunity and that even if it is, it was procedurally improper for the district court to dismiss his complaint on that basis under Rule 12(b)(6). He also argues that the district court abused its discretion in dismissing his complaint without granting him leave to amend.

DISCUSSION

We review the dismissal of a complaint under Rule 12(b)(6) *de novo*, taking as true the material facts alleged in

the complaint and drawing all reasonable inferences in favor of the plaintiff. *See Bernheim v. Litt*, 79 F.3d 318, 321 (2d Cir. 1996); *Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co.*, 32 F.3d 697, 699-700 (2d Cir. 1994). A dismissal under Rule 12(b)(6) for failure to state a cognizable claim may be affirmed only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Citibank, N.A. v. K-H Corp.*, 968 F.2d 1489, 1494 (2d Cir. 1992); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

A. Official Immunity

The district court dismissed Pani's claim for negligence on the ground that Empire was entitled to official immunity for acts taken in its capacity as a Medicare carrier. In doing so, however, the district court recharacterized—and enlarged—Pani's claim for negligence, probably based on Pani's own recharacterization of that claim at oral argument. Pani's complaint confined Empire's alleged wrongdoing to investigating and reporting Pani for fraud. It alleged that Empire had "duly assigned a procedure code" of 5211 to the facet rhizotomy claims submitted by Pani and not that the code assigned was improper or that Empire had failed to follow proper administrative procedures in assigning the code.[1] The

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[1] Pani's complaint, in pertinent part, reads as follows:

8. That claims for reimbursement were submitted by PANI for the performance of the said facet rhizotomy procedure regarding which EMPIRE duly assigned a procedure code thereto, namely code no. "5211".

9. That following payment of said claims, EMPIRE improperly, intentionally, carelessly, recklessly and/or negligently sought repayment from and sanctions against PANI, wherein defendant represented that the said claims were fraudulent and fictitious, when EMPIRE knew or should have known that such claims were valid, due and owing.

10. That the said representations by EMPIRE which were made to HHS regarding the validityof the aforestated claims submitted by PANI, were wholly false and untrue.

district court, however, described Pani's claim as one for negligence "for assigning [Pani] an improper billing code, for failing to verify that code with HHS, and for subsequently reporting to HHS that Pani had filed fraudulent reimbursement claims using that same code." *Pani*, 1996 WL 734889, at *4.

We limit our review, as we must, to the allegations contained within the four corners of Pani's complaint. *See Newman & Schwartz v. Asplundh Tree Expert Co.*, 102 F.3d 660, 662 (2d Cir. 1996) (" '[i]n considering a motion to dismiss for failure to state a claim . . . a district court must limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference' " (quoting *Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir. 1991))); *Jojola v. Chavez*, 55 F.3d 488, 494 (10th Cir. 1995) (same); *Palda v. General Dynamics Corp.*, 47 F.3d 872, 875 (7th Cir. 1995) (same); *Doyle v. Oklahoma Bar Ass'n*, 998 F.2d 1559, 1566 (10th Cir. 1993) (same). Accordingly, the only issue before us is whether a Medicare carrier is entitled to official immunity for the performance of its duty to investigate and report possible fraud.

Several circuits have held that a fiscal intermediary or carrier is entitled to sovereign immunity on the rationale that the suit at issue is really one against the United States because the fiscal intermediary or carrier is a government agent that "act[s] on behalf of the [Medicare] Administrator in carrying out certain administrative responsibilities that the law imposes" and is entitled to indemnification from the United States, which, therefore, is "the real party of interest." 42 C.F.R. 421.5(b); *see, e.g., Brooks v. Blue Cross and Blue Shield*, 116 F.3d 1364, 1382-83 (11th Cir. 1997) (fiscal intermediary entitled to sovereign immunity only to the extent that government is exposed to financial risk); *Anderson v.*

Occidental Life Ins. Co., 727 F.2d 855, 856-57 (9th Cir. 1984) (per curiam) (claim for negligent infliction of mental anguish by medicare carrier barred by sovereign immunity); *Matranga v. Travelers Ins. Co.*, 563 F.2d 677 (5th Cir. 1977) (per curiam) (sovereign immunity prevented action against intermediary for alleged misconduct in processing claims); *Peterson v. Weinberger*, 508 F.2d 45, 51-52 (5th Cir. 1975) (sovereign immunity applied to claim of alleged wrongful suspension of payments for fraud); *Pine View Gardens, Inc. v. Mutual of Omaha Ins. Co.*, 485 F.2d 1073, 1074-75 (D.C. Cir. 1973) (claim for unpaid benefits barred by sovereign immunity).

Fewer circuit courts have decided the issue of whether fiscal intermediaries and carriers are entitled to official immunity for discretionary acts taken within the scope of their authority under the Medicare Act. *See, e.g., Bushman v. Seiler*, 755 F.2d 653, 655-56 (8th Cir. 1985) (official immunity granted to consultant of Medicare carrier for reporting fraud to carrier); *Peterson v. Blue Cross/Blue Shield*, 508 F.2d 55, 58 (5th Cir. 1975) (holding by implication that employee of both fiscal intermediary and carrier was entitled to official immunity in connection with suspension of payments for fraud). Several district courts, however, have held that fiscal intermediaries and carriers are entitled to official immunity. *See, e.g., Midland Psychiatric Assocs. v. United States*, 969 F. Supp. 543, 551-52 (W.D. Mo. 1997) (carrier entitled to official immunity for alleged wrongful denial of benefits); *C. Jack Friedman, Ph.D. & Assocs., P.C. v. Pennsylvania Blue Shield*, 836 F. Supp. 263, 268 (E.D. Pa. 1993) (carrier entitled to official immunity for claims based on its report of fraud); *Livingston v. Blue Cross and Blue Shield*, 788 F. Supp. 545, 549-50 (S.D. Ala. 1992) (fiscal intermediary entitled to official immunity for claims arising from intermediary's instigation of fraud prosecution); *Group*

Health Inc. v. Blue Cross Ass'n, 739 F. Supp. 921, 932-33 (S.D.N.Y. 1990) (fiscal intermediary entitled to official immunity for claims based on negligent misrepresentations).

In *Westfall v. Erwin*, 484 U.S. 292, 295-97 (1988), the Supreme Court held that a federal official is shielded from state-law tort liability for acts that are discretionary in nature and fall within the outer perimeter of the official's duties. As *Westfall* made clear, the determination of whether immunity should apply requires a functional inquiry: "immunity attaches to particular official functions, not to particular offices." *Id.* at 296 n.3. The rationale behind such immunity is a concern that "the threat of liability will make federal officials unduly timid in carrying out their official duties, and that effective government will be promoted if officials are freed of the costs of vexatious and often frivolous damages suits." *Id.* at 295.

The application of the *Westfall* test to federal officials was superseded by Congress's passage in 1988 of the Federal Employees Liability Reform and Tort Compensation Act, also known as the Westfall Act, which eliminated the requirement that the acts be discretionary. *See* 28 U.S.C. § 2679(d). However, the *Westfall* test remains the framework for determining when non- governmental persons or entities are entitled to the same immunity. *See Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1446-50 (4th Cir. 1996); *Slotten v. Hoffman*, 999 F.2d 333, 336 (8th Cir. 1993); *Midland Psychiatric*, 969 F. Supp. at 551-52.

If Empire had been an actual federal official, it unquestionably would have been entitled to official immunity for investigating and reporting possible fraud. *See Peterson v. Weinberger*, 508 F.2d at 50-51 (finding government integrity specialist officially immune because it was his responsibility to investigate claims of fraud and abuse and there was no evidence that he had acted beyond his scope of employment);

Mangold, 77 F.3d at 1447 (recognizing as a general matter that official immunity would protect official decisions to investigate suspected fraud in the administration of government contracts).

The policy considerations underlying the extension of official immunity to a federal official's duty to investigate and report suspected fraud apply with equal force to a fiscal intermediary or carrier. "The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy" or by private contractors. *Barr v. Matteo*, 360 U.S. 564, 572-73 (1959); *see also Mangold*, 77 F.3d at 1447-48 (concluding that official immunity attaches to discretionary governmental functions even when they have been delegated to the private sector); *cf. Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988) (finding that "[i]t makes little sense to" hold government contractor liable for design defects in military equipment when government would have been shielded from liability had it produced the defective equipment itself). "Even though private persons under contract with the government act only partly in the public sphere, the public interest may demand that immunity protect them to the same extent that it protects government employees." *Mangold*, 77 F.3d at 1447.

The investigation and reporting of possible Medicare fraud is precisely the type of delegated discretionary function that the public interest requires to be protected by immunity. Medicare fraud exacts an enormous toll on the public fisc—estimated losses from fraud and other improper Medicare payments exceed $20 billion a year. *See* Department of Health and Human Services, *CFO Audit Action*, 1998 WL

213154 (Apr. 24, 1998). The carriers and fiscal intermediaries that administer the millions of Medicare claims filed annually are indispensable components of the governmental program and are in a unique position to combat the drain on public resources caused by fraudulent claims. *See Group Health Inc.*, 739 F. Supp. at 933 ("HHS and the Secretary rely heavily on the participation of fiscal intermediaries, who possess accounting and health care expertise, in order to efficiently administer the [Medicare] program."); *see generally United States v. Erika, Inc.*, 456 U.S. 201, 203, 208 n.11 (1982) (discussing efficiency of having private insurance companies pay Medicare claims and volume of Medicare claims). The public interest in having Medicare fraud detected and prevented would be thwarted if these non-government entities, who have no personal financial interest in detecting or preventing Medicare fraud, were to find themselves facing damages suits for their efforts in doing so. *See* 42 U.S.C. § 1395t; *cf. Friedman*, 836 F. Supp. at 265 n.2 (noting that carriers have "no financial stake in whether a claim is denied or approved because any payment for claims is made from the [Federal Supplementary Medical Insurance Trust Fund]").

Pani's reliance on *Rochester Methodist Hosp. v. Travelers Ins. Co.*, 728 F.2d 1006 (8th Cir. 1984), for the proposition that Empire is not entitled to immunity because it acted beyond the scope of its authority is misplaced. In *Rochester*, the Court of Appeals for the Eighth Circuit held that a fiscal intermediary was not entitled to sovereign immunity because it had engaged in fraudulent acts that were beyond the scope of its authority and, therefore, the suit was not in fact one against the United States. *Id.* at 1012-16. The parties did not argue, and the court did not decide, whether Travelers might have been entitled to official immunity. The issue before us, however, is official, not sovereign, immunity. Moreover, a

carrier or fiscal intermediary's decision to investigate a particular provider for fraud or to report that provider to the relevant authorities is clearly conduct within the outer perimeter of his authority, *see* 42 U.S.C. §§ 1395h, 1395u; 42 C.F.R. § 405.371(b) (authorizing carriers to suspend payments under circumstances involving fraud or willful misrepresentation); 42 C.F.R. § 421.200 (non-exhaustive list of carrier responsibilities); *Bodimetric Health Servs., Inc. v. Aetna Life & Cas.*, 903 F.2d 480, 482 n.3 (7th Cir. 1990) (cataloguing responsibilities); *Friedman*, 836 F. Supp. at 265 ("[p]art of the carrier's responsibility includes . . . auditing the records of providers as may be necessary to insure that payments are made for services actually rendered"); *Livingston*, 788 F. Supp. at 550 (noting that contract between Blue Cross and HHS "charges the intermediary with the duty to investigate and report suspected instances of fraud and abuse"), and is plainly discretionary in nature, *see Bushman*, 755 F.2d at 656; *Friedman*, 836 F. Supp. at 268; *Group Health*, 739 F. Supp. at 932. In short, *Rochester* has no bearing on this case.

We also reject Pani's contention that the recent Supreme Court case of *Richardson v. McKnight*, 117 S. Ct. 2100 (1997), precludes a grant of official immunity to a private company. *Richardson*, which held that prison guards employed by private management companies were not entitled to qualified immunity, is distinguishable in several respects. *Richardson* involved a § 1983 action for constitutional violations; the defendants were employees of a private for-profit company; the conduct at issue was held not to be an essential or traditional government function; and the Court expressly stated that its holding was a narrow one and did "not involve a private individual . . . serving as an adjunct to government in an essential government activity." *Id.* at 2108. In contrast, the case at hand involves state-law tort claims; fiscal intermediaries and carriers operate under not-

for-profit contracts with the federal government; and, in performing their duty of investigating and reporting instances of public fraud, fiscal intermediaries and carriers are acting as adjuncts to the government and are carrying out a traditional government function. Carriers and fiscal intermediaries

> act on behalf of the Administrator in carrying out certain administrative responsibilities that the law imposes. Accordingly, their agreements and contracts contain clauses providing for indemnification with respect to actions taken on behalf of HCFA and HCFA is the real party of interest in any litigation involving the administration of the program.

42 C.F.R. § 421.5(b).

We are, of course, mindful that "absolute immunity . . . has its costs, since illegal and even offensive conduct may go unredressed," *Mangold*, 77 F.3d at 1446-47, and that the Supreme Court has admonished courts "to consider whether the contribution to effective government in particular contexts outweighs the potential harm to individual citizens." *Westfall*, 484 U.S. at 299-300 (citing *Doe v. McMillan*, 412 U.S. 306 (1973)). We believe, however, that the public interest in combating Medicare fraud outweighs the individual costs of granting immunity, that the threat of liability will make fiscal intermediaries and carriers unduly timid in carrying out their official duty to investigate and report suspected fraud, and that effective government will be promoted if fiscal intermediaries and carriers are freed of the costs of vexatious and often frivolous damages suits that may arise from such conduct. *See id.* at 295. Because our review is limited to the allegations made in Pani's complaint pertaining to the reporting of fraud, we do not reach the issue of whether official immunity would apply to other conduct of a Medicare carrier or fiscal intermediary.

B. Propriety of 12(b)(6) Dismissal on Grounds of Official Immunity

Pani argues that even if a fiscal intermediary might be shielded by official immunity, it was improper for the district court to dismiss the case at the pleading stage on the basis of official immunity. We disagree.

An affirmative defense may be raised by a pre-answer motion to dismiss under Rule 12(b)(6), without resort to summary judgment procedure, if the defense appears on the face of the complaint. *See ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 (3d Cir. 1994); 5A Wright & Miller, *Federal Practice and Procedure* §§ 1277, 1357 (2d ed. 1990 & Supp. 1998); *see also Day v. Moscow*, 955 F.2d 807, 811 (2d Cir. 1992) (res judicata); *Ghartey v. St. John's Queens Hosp.*, 869 F.2d 160, 162 (2d Cir. 1989) (statute of limitations); *Green v. Maraio*, 722 F.2d 1013, 1018-19 (2d Cir. 1983) (qualified immunity). It is also well established that an affirmative defense of official immunity should be resolved as early as possible by the court, *see Siegert v. Gilley*, 500 U.S. 226, 232-33 (1991), and may be resolved by Rule 12(b)(6) if clearly established by the allegations within the complaint, *see Vaughn v. United States Small Bus. Admin.*, 65 F.3d 1322, 1325-27 & n.1 (6th Cir. 1995); *see also Midland Psychiatric Assocs.*, 969 F. Supp. at 550-52 (Rule 12(b)(6) motion granted based on fiscal intermediary's official immunity); *Friedman*, 836 F. Supp. at 268 (same).

We reject Pani's assertion that nothing in his complaint supports Empire's affirmative defense of official immunity. Pani's complaint makes clear that all his allegations against Empire arise out of its role as a carrier for the Medicare "Part B" program. *See* Compl. ¶¶ 4-6, 9. Despite Pani's conclusory allegations that Empire's conduct was negligent and fraudulent, it is also clear, as discussed above, that the acts Pani

complains of—investigating and referring possible fraud to the authorities—were discretionary and within the scope of Empire's duties. *See Group Health*, 739 F. Supp. at 930-33; *Friedman*, 836 F. Supp. at 268; *see also Norton v. McShane*, 332 F.2d 855, 858-59 (5th Cir. 1964) (test is whether the "act [has] more or less connection with the general matters committed by law to the officer's control or supervision, and [is not] manifestly or palpably beyond his authority"). We therefore affirm the district court's finding that the complaint itself establishes the facts necessary to sustain defendant's immunity defense.

Pani contends that the district court relied on extrinsic evidence to determine that immunity should apply and therefore was required to convert the motion to dismiss into a motion for summary judgment under Fed. R. Civ. P. 56, allowing Pani the opportunity to present extrinsic evidence in opposition to the motion. Specifically, Pani points to the district court's reference to the Medicare Carriers' Manual (an exhibit attached to the government's motion papers) for the proposition that Empire was required to investigate and report instances of suspected fraud. This argument lacks merit. The district court referred to *C. Jack Friedman, Ph.D. & Assocs., P.C. v. Pennsylvania Blue Shield*, 836 F. Supp. 263 (E.D. Pa. 1993), for the same proposition, indicating that its conclusion was not dependant upon the Medicare Carriers' Manual. Moreover, as discussed more fully above, the fact that Empire was contractually obligated to investigate and report possible fraud was readily established by reference to statutes and case law. *See, e.g.*, 42 U.S.C. § 1395u; 42 C.F.R. § 405.371(b); 42 C.F.R. § 421.200; *Bodimetric*, 903 F.2d at 482 n.3; *Friedman*, 836 F. Supp. at 265, 268; *Livingston*, 788 F. Supp. at 550. It is well established that a district court may rely on matters of public record in deciding a motion to dismiss under Rule 12(b)(6), including case law and statutes. *See Marshall*

County Health Care Auth. v. Shalala, 988 F.2d 1221, 1222 (D.C. Cir. 1993); *see also Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) (district court could consider documents of which the plaintiff had notice and which were integral to their claim in ruling on motion to dismiss even though those documents were not incorporated into the complaint by reference); *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) (district court may examine public disclosure documents on 12(b)(6) motion).

Even if the district court had impermissibly relied on extrinsic material on a motion to dismiss, and therefore properly should have converted the 12(b)(6) motion to a motion for summary judgment, we would still conclude that Pani was not prejudiced. The government moved for summary judgment in the alternative. Thus, Pani had sufficient notice that summary judgment was possible and ample opportunity to submit supporting affidavits and evidence. *See Groden v. Random House, Inc.*, 61 F.3d 1045, 1052-53 (2d. Cir. 1995); *see also SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (district court's decision must be affirmed if correct result, even if based on improper ground); *George v. Kay*, 632 F.2d 1103, 1106 (4th Cir. 1980) (same). In fact, Pani argued against summary judgment in his memorandum of law to the district court, and in that same memorandum his argument against immunity quoted from and cited to the contract between Empire and HHS that was attached as an exhibit to the government's motion papers.

C. Failure to Grant Leave to Amend

Finally, we reject Pani's argument that the district court erred in dismissing his claims without granting him leave to amend his complaint. Pani never requested leave to amend from the district court, and on appeal he has made no showing that he would be able to amend his complaint in a man-

ner that would survive dismissal. *See Cinel v. Connick*, 15 F.3d 1338, 1346 (5th Cir. 1994); *Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 880 (1st Cir. 1991).

Because we are confined to the four corners of the complaint in assessing whether Empire's alleged wrongdoing was covered by official immunity, we do not reach the issue of whether Empire's acts in approving Pani's claims for facet rhizotomy and assigning a code number without first checking with HHS are also subject to official immunity. However, for a number of reasons, we do not believe that an amended complaint that included this conduct would survive dismissal. First, it is virtually certain that Pani's claims would be barred by the statute of limitations. Under New York law, the statute of limitations is three years for tort claims and six years for contract claims. N.Y. C.P.L.R. §§ 213, 214 (McKinney's 1990). All of the tortious conduct alleged by Pani, whether in the complaint or in subsequent motion papers, occurred prior to November 1983, and Pani had notice of the injurious nature of this conduct no later than the time of his November 1983 indictment. Pani waited nearly ten years, until October 1993, to file his claim in state court, well beyond both the three-year and six-year limitations periods cited above.

Moreover, even if Pani's claim were not barred by the statute of limitations, it is extremely doubtful that there would be subject matter jurisdiction to consider such a complaint in light of the express limitations Congress placed on judicial review of agency determinations of Medicare "Part B" claims filed before 1987. *See* 42 U.S.C. §§ 405(h), 405(g), 1395ff(b), and 1395ii; *Heckler v. Ringer*, 466 U.S. 602, 614-15 (1984) (interpreting § 405(h) to bar judicial review of any claim that is "inextricably intertwined" with benefits determinations under the Medicare Act); *Erika*, 456 U.S. at 206-08 (holding that precisely drawn provisions of § 1395ff evinced Congress's deliberate intention to foreclose judicial

review of Medicare "Part B" claims); *Kuritzky v. Blue Shield*, 850 F.2d 126, 127 n.1 (2d Cir. 1988) (explaining that 1986 amendments allowing judicial review of some claims applied only to Medicare services furnished after January 1, 1987). As we have explained previously, "jurisdiction is lacking where the claim is . . . that the insurance carrier misapplied or misinterpreted valid rules and regulations." *Id.* at 128; *see also Bodimetric*, 903 F.2d at 483- 87; *Midland Psychiatric*, 969 F. Supp. at 547-50; *Gerardi v. Travelers Ins. Co.*, 961 F. Supp. 28 (D. Conn. 1996); *Neiman v. HHS*, 722 F. Supp. 950 (E.D.N.Y. 1988). Pani's proposed new allegations appear to be that Empire was negligent in its handling of his claims by assigning the wrong code number and failing to verify the code with HHS. Because these allegations boil down to assertions that Empire misapplied the Medicare rules and regulations, they are not subject to judicial review.

In light of Pani's failure to request leave to amend and failure to show any meritorious basis upon which he could amend his complaint, we conclude that the district court did not abuse its discretion when it dismissed Pani's complaint without leave to amend. We need not reach Pani's remaining arguments because a determination that Empire's investigation and report of suspected fraud was shielded by official immunity is sufficient to dispose of Pani's entire complaint.

CONCLUSION

We hold that a private insurance company acting as a fiscal intermediary or carrier on behalf of the United States in the administration of a Medicare program is entitled to official immunity for claims that arise out of the performance of its duty to investigate and report possible fraud. Accordingly, the judgment of the district court dismissing claims brought against Empire for investigating and reporting Pani for fraud is AFFIRMED.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED DECEMBER 20, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 8215 (SHS)

KAILASH C. PANI, M.D., and KAILASH C. PANI, M.D., P.C.,

Plaintiffs,

-against-

EMPIRE BLUE CROSS BLUE SHIELD,

Defendant.

OPINION AND ORDER

SIDNEY H. STEIN, DISTRICT JUDGE:

Kailash C. Pani, acting both in his individual capacity and on behalf of his medical practice, has sued Empire Blue Cross Blue Shield ("Empire") for negligence, breach of contract, and interference with contractual relations. Pani contends that Empire acted improperly while serving as a fiscal intermediary in the Medicare program, and that as a result Pani was inadequately compensated for his medical services and was exposed to civil and criminal liability for fraud.

Two motions are currently before this Court. In the first motion, Empire seeks (1) to amend its Answer to include the

affirmative defense of official immunity; and (2) to dismiss Pani's claims on a variety of grounds, including lack of subject matter jurisdiction, official immunity, failure to state a claim, and expiration of the statute of limitations. The Court deems this to be a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). In the second motion, the United States, a non-party, seeks (1) to be substituted as the defendant in this action or, in the alternative, to intervene; and (2) to dismiss the complaint or, in the alternative, to be granted summary judgment. For the reasons set forth below, Empire's motion is granted, the United States' motion is denied, and the complaint is dismissed.

I. DISCUSSION

In its consideration of defendants' motions to dismiss, this Court must assess the legal feasibility of the plaintiff's complaint, not weigh the evidence which might be offered at trial. *See Odom v. Columbia University*, 906 F. Supp. 188, 193 (S.D.N.Y. 1995). The motion should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Cohen v. Koenig*, 25 F.3d 1168, 1172 (2d Cir. 1994). Accordingly, all factual allegations in the complaint are accepted as true and the complaint is viewed in the light most favorable to plaintiff. *Jackson National Life Insurance Co. v. Merrill Lynch & Co.*, 32 F.3d 697, 699 (2d Cir. 1994).

1. *Subject Matter Jurisdiction*

As a threshold matter, this Court notes that it has subject matter jurisdiction in this case on either of two grounds. First, as this case concerns actions taken by Empire in the administration of the Medicare Act, 42 U.S.C. § 1395j *et seq.*,

Pani's complaint "arises under" federal law and this action was thus properly removed to federal court pursuant to 28 U.S.C. § 1441 (b). See Complaint at ¶2; Notice of Removal at ¶6. In addition, and to the extent Pani styles his claims as arising under common law, jurisdiction is also proper on the basis on 28 U.S.C. § 1442(a)(1), which permits removal by "[a]ny officer of the United States or any agency thereof, or person acting under him, for any act under color of such office." Medicare fiscal intermediaries such as Empire "act as agents at the sole direction of the Secretary of HHS," *Peterson v. Weinberger*, 508 F.2d 45, 51 (5th Cir. 1975); as such, their actions are taken "under color of" federal office and they are entitled to remove pursuant to § 1442(a)(1). *Group Health Inc. v. Blue Cross Assoc.*, 587 F. Supp. 887, 890 (S.D.N.Y. 1984) (*"Group Health, I"*); *Peterson v. Blue Cross/Blue Shield of Texas*, 508 F.2d 55, 58 (5th Cir. 1975); *Kuenstler v. Occidental Life Insurance Co.*, 292 F.Supp. 532, 533 (C.D.Cal. 1968). This would be so even if, as Pani asserts, Empire actually acted negligently or exceeded its authority under the Medicare Act. The issue for jurisdictional purposes is whether Pani's relationship with Empire derived solely from the latter's official duties. *Group Health I* at 890 (citing *Willingham v. Morgan*, 395 U.S. 402, 409, 89 S. Ct. 1813, 1817, 23 L.Ed.2d 396 (1969)). The further question of whether Empire's actions were proper or not "is among the ultimate issues to be decided in this matter. Section 1442(a)(1) guarantees defendants the right to present arguments concerning this issue to a federal court." *Id.* at 891.

2. *Empire's Motion to Amend its Answer*

Empire's motion to amend its Answer to assert the affirmative defense of official immunity is granted, pursuant to Fed. R. Civ. P. 15(a). Leave to amend at this stage in the proceedings is a matter for this Court's discretion, and it "shall

be freely given" in the absence of countervailing factors such as undue delay, bad faith or dilatory motive, undue prejudice to the opposing party, or futility of the amendment *See* Fed. R. Civ. P. 15(a); *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L.Ed.2d 222 (1962). No such factors have been shown to exist here. In opposition to Empire's motion, Pani asserts simply that the proposed amendment "fails to allege facts which would support a valid theory" because Empire "is *not* entitled to a grant of 'official immunity.' " Pl. Mem. in Opp. at 29. This assertion does not establish the futility of the proposed amendment, and accordingly Empire's Answer is hereby amended to include the defense of official immunity.

3. *Pani's Claim for Tortious Interference with Contractual Relations*

Empire's motion to dismiss Pani's claim for tortious interference with contractual relations is granted, on the ground that Pani has failed to establish the prima facie elements of his claim. Fed R. Civ. P. 12(b)(6). To state a claim for tortious interference with contractual relations under New York law, "a plaintiff must allege (1) the existence of a valid contract between itself and a third party for a specific term; (2) defendant's knowledge of that contract; (3) defendant's intentional procuring of its breach; and (4) damages." *Riddell Sports Inc. v. Brooks*, 872 F. Supp. 73, 77 (S.D.N.Y. 1995); *Jews for Jesus, Inc. v. Jewish Community Relations Council, Inc.*, 968 F.2d 286, 295 (2d Cir. 1992). Pani has failed to establish any of these elements in this case. Although he asserts in his Complaint that Empire's actions "interfer[ed] with contractual relations between plaintiff and HHS, patients, insurers and/or other recipients of health care and medical services," (Complaint at ¶ 15), these "contractual relations"

refer not to any "per se written contract," but rather to "the general contractual relations that would arise in the course of [Pani's] practice as a physician." Transcript of Oral Argument Aug. 17, 1995, at 10, 12. Specifically, Pani asserts that his patients, "may come to him seeking services in return for a promise that he is going to provide good, reasonable medical services to that patient," and that as a result of Empire's actions, "that relationship . . . between himself and his patients or between himself and other health care providers, other doctors . . . his entire practice and business, contractual type of relationships he had developed . . . has been adversely affected." Id. at 12-13. These assertions do not establish the existence of a specific contract and do not show that Empire knew of any such contract or intentionally incurred its breach. Accordingly, Pani's claim for tortious interference with contractual relations is dismissed for failure to state a claim.

4. *Pani's Claim for Breach of Contract*

Empire's motion to dismiss Pani's breach of contract claim is granted for lack of subject matter jurisdiction, on the ground that Empire's Medicare Part B reimbursement decisions are not subject to judicial review. Fed R. Civ. P. 12(b)(1); 42 U.S.C. § 1395u(b)(3)(c). Pursuant to the Medicare Act as it existed at all times relevant to this litigation,[1] medical providers such as Pani seeking to challenge the amount of a Part B reimbursement were entitled to seek review through a "fair hearing by the carrier." 42 U.S.C. § 1395u(b)(3)(c). All further review of such claims, including judicial review, was deliberately foreclosed by Congress. *See United States v. Erika, Inc.*, 456 U.S. 201, 208, 102 S. Ct. 1650, 1654, 72 L.Ed.2d 12 (1982). Although

1. The relevant provisions of the Act were amended in the Ominibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9341.

judicial review was permitted where there was a challenge to the validity of a Medicare rule or regulation itself, *see Bowen v. Michigan Academy of Family Physicians. et al.*, 476 U.S. 667, 106 S. Ct. 2133, 90 L.Ed.2d 623 (1986), that was not the case where the plaintiff's claim was "merely that the insurance carrier misapplied or misinterpreted valid rules and regulations." *Kuritsky v. Blue Shield of Westem New York. Inc.*, 850 F.2d 126,128 (2d Cir. 1988).

Pani contends that Empire is liable to him "with respect to the payment for medical services rendered," and more particularly for "assign[ing] to Dr. Pani an improper code" and "fail[ing] to reimburse [him] in a uniform and consistent amount of compensation" for procedures which he asserts he performed on his patients. Complaint at ¶¶ 17-18; Transcript of Oral Argument, Aug. 17, 1995, at 15. Plainly, this claim is a challenge to the adequacy of Empire's reimbursement decisions on Pani's Medicare Part B claims, and as such it is directly controlled by the Supreme Court's decision in *Erika*. The claim does not fall within the scope of *Michigan Academy* because Pani does not "attack the validity of any regulation or rule promulgated by the Secretary." *Kuritsky* 850 F.2d at 128. Finally, Pani's characterization of his claim as an issue of private contract law does not suffice to circumvent this jurisdictional bar, for "[i]f litigants who have been denied benefits could routinely obtain judicial review of these decisions by recharacterizing their claims under state and federal causes of action, the Medicare Act's goal of limited judicial review . . . would be severely undermined." *Bodimetric Health Services v. Aetna*, 903 F.2d at 480, 487 (7th Cir. 1990). Accordingly, Pani's claim for breach of contract is dismissed.

Appendix B

5. *Pani's Claim for Negligence*

Empire's motion to dismiss Pani's claim of negligence is granted on the ground that the claim is barred by the affirmative defense of official immunity. Fed. R. Civ. P. 12(b)(6). Federal officials who act within the scope of their authority are immune to common law tort claims arising from their performance of discretionary duties. *See Barr v. Matteo*, 360 U.S. 564, 573-75, 79 S. Ct. 1335, 1341, 3 L.Ed.2d 1434 (1959); *Westfall v. Erwin*, 484 U.S. 292, 296-97, 108 S. Ct. 580, 584, 98 L.Ed.2d 619 (1988). The purpose of this defense is to allow "officials of government [to] be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties — suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous and effective administration of policies of government." *Barr*, 360 U.S. at 571, 79 S. Ct. at 1339.

In this case, Pani contends that Empire is liable to him in tort for assigning him an improper billing code, for failing to verify that code with HHS, and for subsequently reporting to HHS that Pani had filed fraudulent reimbursement claims using that same code. *See* Complaint at ¶¶ 9-11; Transcript of Oral Argument, Aug. 17, 1995, at 17. Even if these assertions are taken as true for the purposes of this motion, Pani's claim is subject to the defense of official immunity because it arises from discretionary actions taken by a federal agent within the scope of its authority.

Official immunity has frequently been extended to private parties that act as agents for the federal government, and in

particular to insurance companies such as Empire that serve as fiscal intermediaries under the Medicare Act. *See Group Health Inc. v. Blue Cross Assoc.*, 739 F. Supp. 921, 931-32 (S.D.N.Y. 1990) *("Group Health III")* (reversing an earlier holding in the same case, *Group Health Inc., v. Blue Cross Assoc.*, 625 F. Supp. 69 (S.D.N.Y. 1985) *("Group Health II"))*; *see also Bushman v. Seiler*, 755 F.2d 653, 655 (8th Cir. 1985); *Friedman v. Pennsylvania Blue Shield*, 836 F. Supp. 263, 268 (E.D.Pa. 1993). As the Court noted in *Group Health III*, fiscal intermediaries "are an integral part of the effective administration of the Medicare program," *id.* at 930, and they exercise "discretion and considered judgment" in the performance of their administrative functions. *Id.* at 931. To subject them "to suit in tort whenever they render an incorrect opinion would . . . inhibit their function as independent decisionmakers" and would "shackle 'the fearless, vigorous, and effective administration of policies of government.' " *Id.* at 932-33. Pani's attempt to avoid this result by styling his claim as an issue of private law against a private actor is without merit. As one federal court has observed, a plaintiffs "self-serving characterization of the capacities in which defendant[ ] [was] acting when [it] committed the alleged wrongs is not determinative. Legal conclusions are for the court." *Roberts v. Hay* 1992 WL 206292 (N.D.Ala 1992) at *2.

Pani's further contention that Empire should be denied official immunity on the ground that it exceeded its authority in this case (*see* Tr. of Oral Argument, Aug. 17, 1995, at 22-23) is similarly unpersuasive. Pani relies primarily on *Rochester Methodist Hosp. v. Travelers Insurance Co.*, 728 F.2d 1006 (7th Cir. 1984), a case in which the defendant had actually defrauded the plaintiff, and in which the government took the position that the defendant had exceeded the scope of its

authority as a fiscal intermediary. *Rochester* at 1009-10. No such facts are present here. It is beyond dispute that Empire's duties as an intermediary include evaluating the validity of reimbursement claims, determining the amount to be paid on such claims, and assisting medical providers in complying with program rules. *See* 42 U.S.C. § 1395u, 42 C.F.R. § 421.200. Thus, its assignment of a billing code to Pani for facet rhizotomies, even if erroneous, and its payment of claims pursuant to that code, were actions within the scope of Empire's authority. Intermediaries are also expected to identify potential instances of fraud and to report such cases to HHS. *See* Medicare Carriers' Manual § 14000 ("Fraud and Abuse"), Ryans Aff. at Exh. B. "Thus, where concerns arise in regard to certain billing methods of medical providers, it is certainly within the authority and duty of [the fiscal intermediary] to notify the proper parties of the billing irregularities." *Friedman* at 268. Accordingly, Pani's negligence claim is barred by the defense of official immunity. The Court notes that this defense applies as well as an additional ground for dismissal of Pani's claims for breach of contract and contractual interference.

6. *The United States of America's Motion*

The motion by the United States to be substituted as the proper party defendant in this action or, in the alternative, to intervene; and to dismiss the complaint or, in the alternative, for summary judgment, is denied in all respects on the ground that it is moot.

II. CONCLUSIONS

For the foregoing reasons, Empire's motion to dismiss is granted, the United States' motion is denied, and the Clerk of

Appendix B

Court is directed to enter judgment dismissing the complaint with prejudice.

DATED: New York, New York
December 20, 1996

SO ORDERED:

s/ Sidney H. Stein
Sidney H. Stein, U.S.D.J.

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED DECEMBER 26, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 CIVIL 8215 (SHS)

KAILASH C. PANI, M.D., and KAILASH C. PANI, M.D., P.C.,

Plaintiffs,

-against-

EMPIRE BLUE CROSS BLUE SHIELD,

Defendant.

JUDGMENT

Defendants having moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), and the United States, a non-party, moves (1) to be substituted as the defendant in this action or, in the alternative to intervene; and (2) to dismiss the complaint or, in the alternative, to be granted summary judgment, and the said motions having come before the Honorable Sidney H. Stein, United States District Judge, and the Court thereafter on December 20, 1996 having rendered its Opinion (77788) and Order, granting Defendants' motion to dismiss the Complaint, and denying the United States' motion it is,

Appendix C

ORDERED, ADJUDGED AND DECREED: That Defendants' motion to dismiss the Complaint be and it is hereby granted, it is further,

ORDERED ADJUDGED AND DECREED: That the United States' motion is denied, accordingly, the Complaint is dismissed with prejudice.

DATED: New York, New York
December 26, 1996

JAMES M. PARKISON
Clerk of Court

By: s/ Robert H. Donovan
Deputy Clerk

Supreme Court, U.S.
FILED
DEC 17 1998
OFFICE OF THE CLERK

No. 98-661

In The

Supreme Court of the United States

October Term, 1998

KAILASH C. PANI, M.D. and KAILASH C. PANI, M.D., P.C.,

Petitioners,

vs.

EMPIRE BLUE CROSS BLUE SHIELD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JEFFREY D. CHANSLER
Counsel of Record
KATHLEEN L. AMES
JOYCE TICHY
EMPIRE BLUE CROSS BLUE SHIELD
Attorneys for Respondent
622 Third Avenue
New York, New York 10017-6758
(212) 476-3207

130309

Counsel Press LLC
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QUESTIONS PRESENTED

1. Are Medicare carriers and intermediaries entitled to official immunity under this Court's holdings in *Westfall v. Erwin*, 484 U.S. 292, 108 S. Ct. 580 (1988) and *Richardson v. McKnight*, 521 U.S. 399, 117 S. Ct. 2100 (1997)?

2. Do the Westfall Act or the Medicare Act prohibit official immunity for Medicare Carriers?

3. Does the "discretionary function" exception to the Federal Tort Claims Act ("FTCA") apply to this case?

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STATEMENT OF JURISDICTION

The petition for a writ of certiorari erroneously represents that it is based upon a judgment of the United States Court of Appeals for the Ninth Circuit, when in fact it is the Second Circuit which affirmed the decision of the United States District Court for the Southern District of New York, 93 Civ. 8215 (SHS) (S.D.N.Y. Dec. 20, 1996).

STATUTORY AND REGULATORY PROVISIONS

42 U.S.C. § 1395u(b) provides, in pertinent part

> Contract with carrier under subsection (a) may be entered into without regard to section 3709 of the Revised Statues [41 USCS § 5] or any other provision of law requiring competitive bidding . . .

42 C.F.R. § 421.200 Carrier Functions

> A contract between HCFA and a carrier . . . specifies the functions to be performed by the carrier which must include, but are not necessarily limited to, the following:
>
> > (2) [the] carrier takes appropriate action to reject or adjust the claim if —
> >
> > > (i) Carrier determines that the services furnished were not reasonable, not medically necessary, or not furnished in the most appropriate setting;
> >
> > > (ii) Carrier determines that the claim does not properly reflect the kind and amount of services furnished.

42 C.F.R. § 405.371(b) provides in pertinent part:

> [W]here the intermediary or carrier has reliable evidence that the circumstances giving rise to the need for a suspension of payments involved fraud or willful misrepresentation, . . . the intermediary or carrier may suspend payments without first notifying the provider or other supplier of an intention to suspend payments.

STATEMENT OF THE CASE

A. The Medicare Program

Medicare is a vast national health insurance program that processes and pays the medical claims of tens of millions of elderly and disabled Americans every year. *See United States v. Erika, Inc.*, 456 U.S. 201, 210 n.11, 102 S. Ct. 1650, 1655 n.11 (1982). The Medicare program was established in 1965 under Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395 *et seq.* (the "Medicare Act"). The Medicare Act consists mainly of Part A, 42 U.S.C. §§ 1395c-1395i, and Part B, §§ 1395j-1395w. Part A provides major medical insurance coverage for hospital care and related post-hospital service, and is funded out of Social Security taxes. 42 U.S.C. §§ 1395d, 1395i; *see Heckler v. Ringer*, 467 U.S. 51, 104 S. Ct. 2218 (1984). Part B establishes a voluntary program of supplemental medical insurance that provides, in general, for reimbursement of 80 percent of the reasonable cost of certain physician services, outpatient physical therapy, x-ray, laboratory testing and similar medical services. 42 U.S.C. § 1395*l*, 42 C.F.R. § 405.231; *see Erika*, 456 U.S. at 202. Part B is financed through the Federal Supplementary Insurance Trust Fund, which, in turn, is funded by appropriations from the Treasury together with monthly premiums paid by the individuals who voluntarily enroll. *See* 42 U.S.C. §§ 1395r, 1395t, 1395w.

In order to meet the extensive administrative obligations imposed by the Medicare program "with maximum efficiency and convenience for individuals entitled to benefits . . . and for providers of services," Congress authorized the Secretary of the Department of Health and Human Services ("HHS") to enter into contracts with private insurance carriers to administer the claims process. 42 U.S.C. §§ 1395h(a), 1395u(a). These health insurance companies are called "fiscal intermediaries" when they administer Medicare Part A claims, and "carriers" when they administer Part B claims.

Medicare carrier contracts are not conventional Government contracts. Instead, pursuant to Congress' specific legislative scheme, they are unique legal arrangements which are not awarded on the basis of competitive bidding, *see* 42 U.S.C. § 1395u(b)(1); 42 C.F.R. § 421.5(a), which contain automatic renewal clauses for continuation from term to term unless either party gives notice, *see* 42 C.F.R. § 421.5(f), *see also* JA 135 (Part B Contract, Article XXVI), which prohibit the carrier from earning a profit on the contract, and which require the carrier to pass costs directly on to the Government, *see* JA 123 (Part B Contract, Article XV, ¶ A) ("It is the intent of this contract that the Carrier, in performing its functions under this contract, shall be paid its cost of administration under the principle of neither profit nor loss to the Carrier.").

Fraud and abuse occur within the Medicare program every day. "Medicare fraud exacts an enormous toll on the public fisc — estimated losses from fraud and other improper Medicare payments exceed $20 billion a year." *Pani v. Empire Blue Cross and Blue Shield*, 152 F.3d 67, 73 (2d Cir. 1998) (App. A), *citing* Department of Health and Human Services, *CFO Audit Action* 1998 WL 213154 (Apr. 24, 1998). Another important aspect of the distinctive relationship between the Government and Medicare carriers is the Government's heavy reliance on the

carriers to monitor and report potential fraud and abuse. HCFA guidelines[1] require Medicare carriers to alert HHS of possible instances of fraud and abuse, *see, e.g.*, JA 52 (Medicare Part B Carriers Manual 1400 (charging carrier with responsibility to alert HHS of suspected fraud)), and in fact provide fifty-seven pages of instructions concerning the carrier's responsibility to develop programs for detecting and reporting potential fraud and abuse, and to cooperate with the Government in its fraud and abuse investigations. (JA 51-108).

> The carriers and fiscal intermediaries that administer the millions of Medicare claims filed annually are indispensable components of the governmental program and are in a unique position to combat the drain on public resources caused by fraudulent claims.

Pani, 152 F.3d at 73. So great is the Government's need for cooperation by carriers and their employees in its anti-fraud efforts that its contracts with carriers also expressly provide for indemnification to the carriers in the event of a retaliatory suit (JA 122-23) (Medicare Part B Contract Article XIV), and it promises a defense by the United States Attorney's office to carriers' fraud unit employees who may be sued in connection with their work. Carriers Manual at 14006 (JA 64).

B. Previous Litigations Involving Pani

Petitioner Kailash Chandra Pani ("Pani") is one contributor to the illicit drain on Medicare that occurs through fraud and abuse. Pani held a license to practice medicine in New York from 1975 until his license to practice medicine was revoked

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1. As indicated by the Joint Appendix (JA 52), these guidelines are in the public record and available through the Government Printing Office.

on August 30, 1989, as a result of criminal and civil convictions resulting from his submission of false Medicare and Medicaid claims. Respondent Empire Blue Cross and Blue Shield ("Empire") is a not-for profit health insurer licensed to do business under Article 43 of the New York State Insurance Law.[2] Pursuant to contracts with HCFA, Empire is the Medicare Part B carrier and Medicare Part A fiscal intermediary for Westchester County in New York State.

In the course of processing Medicare claims filed by Pani, Empire became aware of the possibility that he was engaging in fraud. As it was obligated to do pursuant to the HCFA guidelines, Empire notified the Government of the suspected fraud. The Government thereupon conducted an investigation of Pani, and brought a criminal action against him in the United States District Court for the Southern District of New York, in which Pani was convicted on May 14, 1984 on four counts of mail fraud (18 U.S.C. §§ 1341-42), three counts of making false claims against the United States (18 U.S.C. § 287) and three counts of conversion of Government funds (18 U.S.C. § 641) in connection with Medicare claims he had submitted to Empire. (JA 145-68). Specifically, the District Court found that Pani had not performed the services for which he had billed and sought reimbursement from Empire. (JA 148-52). Furthermore,

2. As the United States pointed out to the Court of Appeals below (United States *amicus* brief at 31), Empire's not-for-profit status is an additional indicator of the appropriateness of affording it immunity from Pani's suit, as it not only has no contractual incentive, but also no corporate incentive, to minimize the financial losses resulting from Medicare fraud. While petitioners correctly point out that Empire, like many other Blue Cross and Blue Shield plans throughout the country, has taken steps to acquire for-profit status, this does not negate the fact that at the time of Pani's investigation and conviction for Medicare fraud, Empire held not-for-profit status. Nor does it negate the fact that Empire, whatever its corporate form, does not earn a profit on its Medicare operations.

Pani was convicted in New York State Supreme Court on one count of grand larceny in the second degree and three counts of offering a false instrument for filing in the first degree, in connection with claims he submitted to New York State's Medicaid Program (the state criminal action). *People v. Pani*, 138 A.D. 2d 532, 525 N.Y.S. 2d 912 (2d Dept. 1988).[3] Also as a result of Pani's submission of false Medicare claims to Empire, the United States obtained a civil judgment against him on October 31, 1991 in the amount of $32,640 pursuant to the False Claims Act, 31 U.S.C. § 3729. (JA-175).

C. The District Court's Decision

Petitioners filed this action against Empire in 1993 in New York State Supreme Court, alleging three state tort claims: negligence, tortious interference with contractual relations, and breach of contract. *Pani*, 152 F.3d at 70 (App. A at 4a). Virtually ignoring the successful portions of the Government's prior cases against Pani, the complaint alleged that, as to those portions in which the Government had not obtained a conviction or judgment, Empire had mishandled his claims, improperly notified the Government of its suspicions of fraud, improperly failed to pay him for the claims that were under scrutiny, and improperly cooperated with the Government's investigation and development of its cases against him. In short, the complaint sought monetary damages from Empire on the theory that it was not Pani's own proven misconduct, but Empire's cooperation with the Government — precisely the type of conduct the Government requires of its Medicare carriers, *see* 42 C.F.R. §§ 405.371(b), 421.200 — that formed the basis for his ultimate legal and business troubles.

Empire removed the action to the federal court pursuant to 28 U.S.C. § 1441. (JA 7-9). Its initial answer asserted the

3. Empire is not involved in the administration of the Medicaid program.

defenses of failure to state a claim and failure to file within the statute of limitations. On April 18, 1995 the United States filed a motion requesting to be substituted as the proper party defendant, or, alternatively, to be allowed to intervene in the action, and also requesting dismissal of the action for lack of subject matter jurisdiction, for failure to meet the statute of limitations, or alternatively for summary judgment. On the same day, Empire sought leave to file an amended answer asserting the additional defense of official immunity, and also joined the United States' motion for dismissal.

The District Court granted Empire's motion to dismiss by dismissing the complaint with prejudice, and denied the United States' motion as moot. *Pani v. Empire Blue Cross and Blue Shield*, 93 Civ. 8215, 1996 WL 734889 (S.D.N.Y. Dec. 23, 1996) (App. B). The court held that Pani's breach of contract claim lacked subject matter jurisdiction, that his claim for tortious interference with contractual relations lacked the *prima facie* elements of that tort, and that his claim for negligence, as well as his other two claims, were barred on the ground of official immunity. *Id.*, 1996 WL 734889 (App. B at 22a-27a).

D. The Second Circuit's Decision

Pani appealed, claiming that the District Court erred in holding Empire entitled to official immunity.[4] The Second

4. In his appeal, Pani also claimed that it was procedurally improper for the District Court to dismiss the case under Rule 12(b)(6), and that the District Court erred in dismissing the complaint without allowing him leave to amend. In affirming, Second Circuit rejected both arguments. In fact, the court found the dismissal without leave to amend proper for three separate reasons. First, "Pani never requested leave to amend from the District Court, and on appeal he has made no showing that he would be able to amend his complaint in a manner that would survive dismissal." *Pani*, 152 F.3d at 76 (App. A at 16a-17a). Second, (Cont'd)

Circuit affirmed. The court began its analysis of the immunity question by citing almost a dozen federal court decisions that have held that Medicare intermediaries and carriers are immune from state tort suits. *Pani*, 152 F.3d at 72 (App. A at 7a-9a). The court then reviewed the law on official immunity as it has developed under *Westfall v. Erwin*, 484 U.S. 292, 295-297, 108 S. Ct. 580 (1988), which holds that "a federal official is shielded from state-law tort liability for acts that are discretionary in nature and fall within the outer perimeter of the official's duties." *Pani*, 152 F.3d at 72 (App. A at 7a-9a). Noting that this same test applies to nongovernmental entities such as Medicare intermediaries and carriers who are performing work on the Government's behalf, *see Mangold v. Analytic Servs., Inc*, 77 F.3d 1442, 1446-1450 (4th Cir. 1996), the court held that Empire's actions in this case clearly fell within the category of discretionary functions entitled to immunity under *Westfall* since "[t]he investigation and reporting of possible Medicare fraud is precisely the type of delegated discretionary function that the public interest requires to be protected by immunity." *Pani*, 152 F.3d at 73 (App. A at 10a). The court also considered,

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(Cont'd)

"it is virtually certain that Pani's claims would be barred by the statute of limitations." *Id.* at 76 (App. A at 17a). Third,

> [I]t is extremely doubtful that there would be subject matter jurisdiction to consider such a complaint in light of the express limitations Congress placed on judicial review of agency determination of Medicare "Part B" claims filed before 1987.

Id. Pani does not challenge any of these in his petition before this Court. Accordingly, even if this Court were to grant the petition, petitioners' case would nevertheless fail on the dual grounds that he failed to file within the statute of limitations, and that his case fails to provide the court with subject matter jurisdiction.

and rejected, Pani's claim that a contrary result would be mandated under this Court's recent decision in *Richardson v. McKnight*, 521 U.S. 399, 117 S. Ct. 2100 (1997), in that, as distinct from the case before it,

> *Richardson* involved a § 1983 action for constitutional violations; the defendants were employees of a private for-profit company; the conduct at issue was held not to be an essential or traditional government function; and the Court expressly state that its holding was a narrow one and did "not involve a private individual . . . serving as an adjunct to government in an essential government activity."

Pani, 152 F.3d at 73 (App. A at 12a). Here by contrast, a Medicare carrier's functions are defined by an unique statutory scheme under which its actions are, by Congressional design, "indispensable components" of a governmental program of such great "complexity and magnitude" that their delegated role is no less critical to the program's success than that of the Government itself. In these circumstances, the court concluded, Medicare carriers must be allowed to administer the program free of "the costs of vexations and often frivolous damages suits that may arise from such conduct," lest the fear of such suits make them "unduly timid in carrying out their duty to investigate and report suspected fraud." *Pani*, 152 F.3d at 74 (App. A at 13a).

REASONS FOR DENYING THE WRIT

While this case illustrates the extremes to which an individual will go, even after his criminal conviction, to attempt to transfer the blame for his criminal acts away from himself, it presents no "compelling reasons," as required by this Court's Rules, warranting the issuance of a writ of certiorari. The

Second Circuit's holding is clearly correct, and presents no important issue of federal law, for it is merely one of a long line of cases that have appropriately enunciated this Court's holding in *Westfall* that a federal official is immune from state tort claims "for acts that are discretionary in nature and fall within the outer perimeter of [its] duties," *Pani*, 152 F.3d at 72 (App. A at 7a-9a), and that also have appropriately applied that test to non-governmental entities such as Medicare carriers that conduct the Government's business.

Nor is there any reason existing outside the four corners of the Second Circuit's decision mandating review of this case. That decision creates no conflict with any other Court of Appeals; to the contrary, there is virtual unanimity among the federal courts, including as recently as this year, *see, e.g.*, *Midland Psychiatric Ass'n., Inc. v. U.S.*, 145 F.3d 1000 (8th Cir. 1998), that Medicare carriers are entitled to immunity for their work on behalf of Medicare. Nor is there any conflict here with a state court of last resort. Nor, contrary to petitioners' claims, is there any conflict between the Second Circuit's decision below and this Court's recent ruling in *Richardson v. McKnight*, 521 U.S. 399, 117 S. Ct. 2100 (1997), for the Court of Appeals also properly stated and applied the rule of law set down in *Richardson*, to the limited extent of its applicability to the highly distinguishable circumstances here.

In fact, this is precisely the kind of case that should be left to the Courts of Appeals to decide, for it is one among many through which the scope of *Richardson* will be interpreted, distinguished, and/or clarified within the broadly developed *Westfall* line of cases. For this Court to reconsider the issue of official immunity now, before *Richardson's* teachings have had the chance to percolate through the Courts of Appeals, would disserve the historic relationship between the levels of review that underlie the writ's discretionary limitations.

I.

THE COURT OF APPEALS' DECISION IS CORRECT.

This Court's holding in *Westfall* provides that "a federal official is shielded from state-law tort liability for acts that are discretionary in nature and fall within the outer perimeter of the official's duties." *Pani*, 152 F.3d at 72 (App. A at 9a), *citing Westfall*. As the Second Circuit correctly noted, the courts have adopted this same test in determining the scope of official immunity afforded to government contractors charged with state tort violations. *Pani*, 152 F.3d at 72 (App. A at 9a), *citing cases*.

Here, without question, Empire's actions both are "discretionary in nature" and "fall within the outer perimeter" of its duties. As the court noted,

> The investigation and reporting of possible Medicare fraud is precisely the type of delegated discretionary function that the public interest requires to be protect by immunity.

Pani, 152 F.3d at 72 (App. A at 10a). It would be impossible to conclude otherwise, as these duties are specifically required of Medicare carriers in the HCFA Medicare Manual (JA 52). In fact, petitioners do not even argue that the Second Circuit either incorrectly enunciated or misapplied *Westfall* in so concluding.

As importantly, the decision of the Second Circuit accurately reflects the special relationship between Medicare carriers and the Government that Congress envisioned, and thereby advances not only Congress' intent but also the public's significant interest in the Medicare program's effectiveness, efficiency and financial soundness. Indeed, the allegations that lie at the heart of this case are challenges to the best aspects of

that relationship, in which the Government has delegated critical functions such as fraud detection and reporting to the carriers, with the expectation that they use their own initiative to effectuate that important work. Were carriers to be faced with the significant downside of "vexatious litigation" such as this case for taking these kinds of steps, the success of the entire Medicare program's anti-fraud efforts would be seriously undermined.

II.

THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH *RICHARDSON*.

Petitioners' primary goal is to create the false illusion that there is sufficient similarity between this case and *Richardson v. McKnight*, 521 U.S. 399, 117 S. Ct. 2100 (1997), to warrant a second guessing of the Second Circuit's decision to grant immunity to Empire. But the two cases are, as the Second Circuit correctly recognized, so distinguishable on the facts and the law that the result in *Richardson* cannot control here.

Richardson was an action by an inmate under 42 U.S.C. § 1983 against two prison guards employed by a private sector correctional institution for deprivation of his constitutional rights by placing him in extremely tight physical restraints. Recognizing at the outset the special nature of section 1983 as a statute that "creates a species of tort liability that on its face admits of no liabilities," this Court noted that its prior decisions had nevertheless, albeit circumspectly, extended a qualified immunity from section 1983 suits where the

> tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine.

521 U.S. 399, 117 S. Ct. at 2103. Then, analyzing the history surrounding the issue of immunity for privately employed prison guards as it would have appeared to the Congress that enacted section 1983, as well as the purposes behind the immunity doctrine, the Court concluded that neither one furnished the evidence that Congress would have wanted to nullify the protections of section 1983 by extending immunity to such persons.

Contrary to what petitioners would have this Court believe, the Second Circuit did not ignore or misapply this analysis. Rather, the Court of Appeals addressed, and rejected, petitioners' claim that *Richardson* mandates a denial of official immunity to Empire. First, the court below noted, the legal theories underlying this case and *Richardson* are critically different, 153 F.3d at 74. *Richardson* concerned a constitutional claim for the violation of the most basic of individual rights through personal force, 521 U.S. 399, 117 S. Ct. at 2105, whereas petitioners' only alleged causes of action are state tort claims arising out of Empire's denial of payments and its reporting of Pani's suspected fraud to the Government. This Court has taken account of the obvious differences in the weight of these two kinds of interests by finding official immunity to be more limited as against constitutional claims than as against state tort claims. *See, e.g., Nixon v. Fitzgerald*, 457 U.S. 731, 747, 102 S. Ct. 2690, 2700 (1982); *Barr v. Mateo*, 360 U.S. 564, 572-576, 79 S. Ct. 1335, 1340-1342 (1959); *Butz v. Economou*, 438 U.S. 478, 508-512, 98 S. Ct. 2894, 2911-2913 (1978) (distinguishing *Barr v. Mateo* by noting that, "[A] quite different question would have been presented had the officer ignored an express statutory or constitutional limitation on his authority"); *Harlow v. Fitzgerald*, 457 U.S. 800, 807-808, 102 S. Ct. 2727, 2732 (1982); *Wyatt v. Cole*, 504 U.S. 158, 112 S. Ct. 1827, 1831 (1992) ("[I]rrespective of the common law support, we will not recognize an immunity available at

common law if § 1983's history or purpose counsel against applying it in § 1983 actions."). While *Richardson* represents the more rigorous test applicable to section 1983 claims against private entities employed by a government, *Westfall* provides the test for state tort claims against government contractors.

In addition, the Court of Appeals recognized that there are dispositive factual distinctions between this case and *Richardson*. In *Richardson*, this Court carefully limited its holding to the very specific facts of that case.

> [W]e have answered the immunity question narrowly, in the context in which it arose. That context is one in which a private firm, systematically organized to assume a major length administrative task (managing an institution) with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms.

Id., 521 U.S. 399, 117 S. Ct. at 2108. As the Second Circuit noted, Empire is different from the *Richardson* prison company in almost every one of these respects.

In *Richardson*, the relevant government body, the State of Tennessee, had clearly indicated an intention not to align its interests with the private prison company by barring state sponsored indemnification for such companies regarding civil rights claims. *Id.*, 521 U.S. 399, 117 S. Ct. at 2106-07. Here, the opposite is true. The Medicare Act's legislative history shows that Congress anticipated and intended that the federal Government work hand in hand with Medicare carriers and intermediaries, so much so that it would voluntarily take on the entirety of the legal responsibility for the lawsuits that would arise out of the Medicare program.

> In the performance of their contractual undertakings, the carriers and fiscal intermediaries would act on behalf of the Secretary carrying on for him the governmental administrative responsibilities imposed by the bill. The Secretary, however, would be the real party in interest in the administration of the program, and the Government would be expected to safeguard the interests of his contractual representatives with respect to their actions in the fulfillment of commitments under the contracts and agreements entered into by them with the Secretary.

S. Rep. No. 404, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News 1943, 1992-95, *cited in Bodimetric Health Servs. v. Aetna Life & Cas.*, 903 F.2d 480, 487 (7th Cir. 1990). By virtue of this Congressional design, a Medicare intermediary or carrier so completely stands in the Government's shoes that a number of courts have found it entitled to sovereign immunity in the same manner as the Government itself. *See Pani*, 152 F.3d at 72, *citing cases*; *Bodimetric v. Aetna Life & Cas.*, 903 F.2d 480 (7th Cir.), *cert. denied*, 111 S. Ct. 579 (1990) (Congress apparently did not differentiate between the respective abilities of public and private agencies to serve as fiscal intermediaries."). Thus the Second Circuit was justifiably comfortable in its conclusion that, at the very least, a Medicare carrier serves "as an adjunct to [the] government in an essential government activity," warranting official immunity. *Pani*, 152 F.3d at 74, *citing Richardson*, 521 U.S. 399, 117 S. Ct. at 2108.

Furthermore, unlike the prison company in *Richardson* Empire is a not-for-profit corporation which, even if its corporate structure allowed it to do so, is not entitled under its contract with HCFA to make a profit on its Medicare operations. Whereas in *Richardson* the private prison company did not need

the protection afforded by the doctrine of official immunity since "competitive pressure" would provide "strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful or non-arduous employee job performance," *id.*, 117 S. Ct. at 2106-07, Empire neither gains any discernible benefit from aiding the Government in its anti-fraud efforts, nor does it have any financial incentive to accept the costly risks of the kind represented by this suit. Thus, a lack of official immunity for carriers would deter organizations like Empire from entering into carrier contracts with the Government, *see Harlow*, 457 U.S. at 814 (expressing concern about the deterrence of an able citizen from acceptance of public office), and, even where those contracts were entered into, would deter them from working "vigorously" to promote the Government's anti-fraud efforts.

Notwithstanding the Second Circuit's careful parsing of *Richardson*, petitioners claim that it erroneously omitted to conduct the kind of "historical analysis" that petitioners would deem analogous to *Richardson*. Yet far from being an error, the Second Circuit's approach once again reflected the significant legal and factual distinctions between *Richardson* and the case before it. The particular purpose behind *Richardson*'s historical analysis was to determine whether, given that section 1983 was at the heart of the case, there was *at the time of section 1983's enactment* a such a strong "tradition of immunity . . . in the common law" that Congress's silence on the matter should not be taken as an intent to abolish it. *Richardson*, 521 U.S. 399, 117 S. Ct. at 2103. Thus, the *Richardson* analysis was, in effect, an attempt to fill in the legislative history of section 1983.

To look at the history of immunity at the time of section 1983's passage would, needless to say, be an odd procedure in a case such at this where that statute is irrelevant. It would be odder still to look back a century when, as petitioners

themselves point out, the Medicare program which is under review "is fewer than 35 years old." (Petition at 10). Nevertheless, petitioners seem to advocate just such an unusual result. They propose that a court must look back in time, not to the point of Medicare's passage, or to the time when the Government first began to enlist the services of Medicare intermediaries and carriers, or to any other remotely appropriate point, but *to the time before Medicare existed at all*, to determine whether official immunity was afforded to private health insurance companies for tortious acts. The analysis as so structured would accomplish petitioners' self-serving goal, for no history of official immunity would of course exist in an arena during a time before there was any governmental activity there.

A more thoughtful analysis, and the one that the Court of Appeals employed, is to look to the circumstances surrounding the enactment of *the Medicare program*, along with the regulations and case law surrounding it, to determine whether affording immunity to a Medicare carrier for cooperating with Governmental fraud investigations is consistent with the intent of the Medicare law and regulations. Such an analysis leads to a resounding yes. It is clear from the many protections the Government has offered to Medicare carriers and their employees, including indemnification, representation, and substitution as the proper party in lawsuits, that the Government intends to insulate these entities from the negative impact of suits brought in retaliation for their aid to the Government. And the courts have so recognized for at least twenty five years by holding Medicare carriers and intermediaries immune from suit. *See, e.g., Pine View Gardens, Inc. v. Mutual of Omaha Ins. Co.*, 485 F.2d 1073, 1074-75 (D.C. Cir. 1973); *Peterson v. Weinberger*, 508 F.2d 45, 51 (5th Cir.) *cert. denied*, 423 U.S. 830, 96 S. Ct. 50 (1975); *Peterson v. Blue Cross/Blue Shield*, 508 F.2d 55, 57 (5th Cir.), *cert. denied*, 422 U.S. 1043, 95 S.

Ct. 2657 (1975). This has consistently been the state of the law up to the present day. Recent cases continue to afford immunity to Medicare carriers and intermediaries, *see, e.g., Midland Psychiatric Ass'n. v U.S.*, 145 F.3d 1000, 1003-04 (8th Cir. 1998); *Group Health Inc. v. Blue Cross Ass'n*, 739 F. Supp. 921, 932-33 (S.D.N.Y. 1990), as well as those who work for them, *see, e.g., Bushman v. Seiler*, 755 F.2d 653, 655 (8th Cir. 1985).

Finally, while petitioners also fault the Court of Appeals for failing to identify the purposes of the official immunity doctrine to their satisfaction, there is once again no error in that Court's analysis. For the Second Circuit quite clearly articulated the fact that, unlike in *Richardson*, the Government here has an obvious need to obtain full cooperation from its Medicare carriers and intermediaries in its fraud fighting efforts, particularly in the absence of any financial incentives. This need mandates a finding that official immunity be afforded to these entities lest "the threat of liability might appreciably inhibit the fearless, vigorous and effective administration of policies of government." *Barr v. Mateo*, 360 U.S. at 571, 79 S. Ct at 1339.

III.

NEITHER THE WESTFALL ACT NOR THE MEDICARE ACT PRECLUDES OFFICIAL IMMUNITY FOR MEDICARE CARRIERS.

Petitioners next ask this Court to discover a conflict, never before identified by any judicial opinion on this subject, between common law official immunity for Medicare carriers and the legal protections afforded to those carriers under the Westfall Act and the Federal Tort Claims Act. First outlining the significant lengths to which Congress and HCFA have gone

to shield Medicare carriers from suit, including by providing for indemnification and substitution of the United States as the real party in interest in cases involving the Medicare program, petitioners then assert that in affording these protections Congress and HCFA somehow signaled an intent that Medicare carriers not be afforded official immunity.

However disgruntled petitioners may be over the different forms of legal protection afforded Medicare carriers, there is nothing in the Medicare Act, the Westfall Act, their legislative history, any applicable regulations, or any of the cases affording immunity to Medicare carriers which even remotely suggests that official immunity is in "conflict" with these other protections. In fact, Congress' announced intention to indemnify Medicare carriers and to substitute the United States as the real party in interest in these suits indicates just the opposite; namely, that Congress wanted to give Medicare carriers the maximum protection available under the law, and certainly more than typically afforded to other government agents, in exchange for the extensive responsibilities that they were accepting on a no-profit basis.

And while petitioners profess there to be "no need" for the protection of official immunity where such other protections exits, this case itself is an illustration of the fallacy of that statement. For the fact is that, notwithstanding the theoretical possibility that the United States could choose to be substituted as the real party in interest in cases involving the Medicare program, Empire has no control over whether the Government actually does so. In this case, the Government took no action to be so substituted for more than a year after the suit was filed, and though it ultimately did move for substitution the District Court denied its motion as moot at that time. (JA-197). This is not the first case in which such circumstances have arisen. *See Midland Psychiatric Ass'n. Inc. v. U.S.*, 969 F. Supp. 543, 551

(1997), *aff'd*, 145 F.3d 1000 (8th Cir. 1998) (noting that Government's withdrawal of request to be substituted for Medicare carrier precluded application of FTCA). Thus the "extra protection"of the FTCA that petitioners find so redundant and unfair is simply not available to Empire here. Given the reality of this litigation scenario, official immunity does, and should, "remain[] a viable defense for" Empire. *Midland*, 969 F. Supp. at 552.

Finally, despite petitioners' protestations that they will never get their full day in court against the United States if this matter is dismissed, they were free to file this action at the outset against both Empire and the United States but appear to have chosen for strategic reasons (one possibility being the avoidance of the Government's own immunity defense) not to do so. Thus it is without any foundation that petitioners now claim that their avenues for relief have been unfairly cut off by the availability to Empire of official immunity in addition to its other legal protections.

IV.

THERE IS NO CONFLICT BETWEEN THE FTCA AND COMMON LAW IMMUNITY DOCTRINE AS TO THE MEANING OF "DISCRETIONARY" CONDUCT.

In their final attempt to pique this Court's interest in their case, petitioners accuse the Court of Appeals — and all the other courts cited below that have held Medicare carriers and intermediaries entitled to immunity — of failing to recognize yet another imagined confusion in the law. According to petitioner, the common law definition of discretionary acts that has developed under *Westfall* for purposes of the official immunity doctrine is inappropriately broader than the meaning this Court has given to the "discretionary function" exception

set forth in the FTCA, 28 U.S.C. § 2680(a). Therefore, suggest petitioners, this Court's review is necessary to straighten out this inconsistency.

There are three reasons why this claim presents no basis for certiorari review. First, petitioners' claimed conflict is purely theoretical, for there has never been any argument that the FTCA applies to this case. Rather, *Westfall*'s holding, including that portion that relates to the subject of discretionary acts (which petitioners nowhere claim to have been misconstrued by the Court of Appeals), is the test to be used for the official immunity defenses raised by individuals and private entities like Empire that face state-law tort claims arising from their performance of governmental functions. *See Mangold v. Analytic Servs, Inc.*, 77 F.3d 1442, 1446-50 (4th Cir. 1996) (private Government contractor absolutely immune from state-law tort liability under *Westfall* for responding to and cooperating with government investigation). In order to address petitioner's claim, the Court would have to interpret and apply the FTCA to the facts of this case on a purely theoretical basis, which would run contrary to its mandate to decide only those issues of law that are actually presented by the case before it.

Second, even assuming the nonexistent circumstance that the FTCA did apply to this case, there is no conceptual impropriety in giving the FTCA's "discretionary function" test a different scope than that which triggers official immunity. In *Molzof v. United States*, 502 U.S. 301, 310-11, 112 S. Ct. 711, 717 (1992), this Court discussed this very statutory term in order to illuminate its interpretation of another provision of the FTCA. In so doing, the Court forthrightly acknowledged that common law standards had not been incorporated in judicial explications of what is a "discretionary function," and the Court saw no error in this. To the contrary, it was clearly comfortable with the concept that such a term could have different statutory and common law meanings.

Third, even if it were necessary to incorporate the FTCA discretionary function test into the common law official immunity doctrine, Empire's actions in this case would still meet that test. In support of the contrary claim, petitioners assert that under *Berkovitz v. United States*, 486 U.S. 531, 108 S. Ct. 1945 (1988), Empire's conduct "could not be found to be discretionary," because the acts of which they complain have not been shown to be part of sufficiently high level policy making decisions to qualify as discretionary. However, in *United States v. Gaubert*, 499 U.S. 315, 325, 111 S. Ct. 1267, 1275 (1991), this Court, in applying *Berkovitz*, rejected just such an interpretation. In that case, the shareholder of an insolvent savings and loan sued the United States, alleging that federal regulators had insufficiently supervised the association's directors and officers. The United States moved to dismiss under the FTCA's discretionary function exception. This Court agreed that the exception barred the claim. Said the Court:

> A discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policymaking or planning functions. Day-to-day management of banking affairs, like the management of other business, regularly requires judgment as to which of a range of permissible courses is the wisest. Discretionary conduct is not confined to the policy or planning level. "[I]t is the nature of the conduct, rather than the status of the actor, that govern whether the discretionary function exception applies in a given case."

Id., 499 U.S. at 325, 111 S. Ct. at 1275 (citations omitted). Here, the conduct complained of was to assign procedure codes to Pani's questionable medical procedures and then later to investigate and report the insurance claims that he had submitted

to obtain reimbursement for those procedures, while withholding payments. In line with *Gaubert*, these activities required judgment and decision making on the part of Empire employees. Petitioners do not complain that these actions "were controlled by mandatory statutes or regulations," *Gaubert*, *id.*, 499 U.S. at 330, 111 S. Ct. at 1277. Nor can they deny that "these day-to-day 'operational' decisions were undertaken for policy reasons of primary concern to the regulatory agenc[y]." *Id.*, 499 U.S. at 332, 111 S. Ct at 1278. Consequently, following the analysis of *Gaubert*, Empire would also be entitled to dismissal of this suit under the FTCA's discretionary function exception.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JEFFREY D. CHANSLER
Counsel of Record
KATHLEEN L. AMES
JOYCE TICHY
EMPIRE BLUE CROSS BLUE SHIELD
Attorneys for Respondent
622 Third Avenue
New York, New York 10017-6758
(212) 476-3207